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FCPA Self-Reporting Still A Tough Sell

By **Samuel Howard**

Law360, New York (February 25, 2011) -- The dilemma companies face when deciding whether to report possible violations of the Foreign Corrupt Practices Act isn't getting any easier, as the risks of self-reporting look more and more clear, while the rewards remain nebulous at best, experts say.

While companies have no obligation to voluntarily disclose bribery and other potential violations of the FCPA, the U.S. Department of Justice and the U.S. Securities and Exchange Commission have encouraged companies to come forward without codifying the benefits of doing so.

The invitation has gotten harder to resist as the government has gone on an enforcement tear, racking up more than $2 billion in FCPA fines and penalties, and unveiled tantalizing incentives to corporate whistleblowers.

Yet for all of the carrots and sticks used to coax greater disclosure, the benefits of self-reporting remain foggy, and companies should carefully weigh costs and repercussions of the action, according to Mayer Brown LLP's Michael Volkov.

"In the absence of consistent standards, voluntary disclosure is a crapshoot," Volkov said. "Without a uniform set of rules the FCPA fails to treat companies consistently and fairly and undermines the administration of justice."

While there are certainly circumstances when the magnitude or the nature of a problem requires a company to be aboveboard, much of the time issues involve smaller sums and isolated acts and a rigorous internal response is the best remedy.

In those murkier instances, companies face the predicament of either reporting a problem, potentially triggering vast and expensive investigations, or dealing with the issue itself and running the risk of higher fines if the government is brought in, Volkov said.

Even though the government has cited instances in which FCPA penalties were reduced for cooperation, without clear examples it is difficult to tell the benefits of disclosure, especially when the fines still run in the tens or hundreds of millions of dollars.
In the recent Tyson Foods Inc. case, the company paid roughly $5 million to settle allegations it slipped government veterinarians in Mexico $100,000, and, while the guidelines called for up to $12 million in penalties, it's hard to measure the effect of cooperation, Volkov said.

While many companies have voiced the need for a clear code of regulations so they can quantify the benefits of self-reporting, the present opacity suits the government fine and translates into dollars, according to Michael Shepard of Hogan Lovells.

"The lack of a formalized policy is good in the eyes of the Justice Department because they are sitting in Fat City. As it is, companies are beating down the government's door with cases and shelling out big bucks to resolve them. From Fat City, the government has little reason to limit its discretion or constrain itself to hard and fast guidelines," Shepard said.

The government has repudiated reports that find little visible benefit to self-reporting but declined to engage in specifics or to offer more explanation about how it calculates the fines and values a company's cooperation. Shepard said.

While some stakeholders want more specific guidance on the FCPA self-reporting process, the sentiment isn't absolute, Shepard said.

"There are no uniform answers. Some companies fear that if the government came out with a clear formula and framework for self-reporting, the policy would just be more draconian," Shepard said. "They feel that it only gets worse the more structured the government's approach becomes."

As much as companies fear punishment from the enforcement agencies, the prospect of losing the focus of an investigation and going on an enormous hunt for misconduct is equally dreadful, attorneys told Law360.

Once a company reports a possible infraction, an immense amount of time, energy and money is devoted to the ensuing investigation, especially if the agencies expand the scope to other issues and countries, according to Sharie Brown of DLA Piper.

“Companies that have never had dealings with enforcement agencies don’t realize how much disclosures and the ensuing investigations impact business,” Brown said. “They can’t imagine how aggressive prosecutors will be or understand the consequences once unexpected compliance issues come out of the woodwork.”

Given the patchiness of the self-reporting process and hesitancy it provokes, the government should give companies an amnesty period in which to examine FCPA compliance and report issues, Brown said.

The intensive review would not only quell corporate unease but also benefit public policy and ensure that compliance programs are watertight, Brown said.

“In an amnesty program, companies would establish controls that are truly commensurate with their risks and operations in order to prevent further misconduct,” Brown said. “Presently, many companies are hesitant to do historical compliance audits for fear of unearthing previously unknown violations.” The odds of giving companies a grace period in order to get their houses in order are slim, however, especially as the public wants to hold companies to greater accountability, according to Alexandra Wrage, president of TRACE International Inc., an anti-bribery compliance company.

Until very recently, there was little reason for companies to run the regulatory gauntlet and take on all of the risks of self-reporting without a clear idea of the rewards, Wrage said.

The Dodd-Frank Wall Street Reform and Consumer Protection Act, specifically the whistleblower provision that entitles an individual to between 10 and 30 percent of any recovery exceeding $1 million, gives companies a new reason to be first to notify the authorities of any potential wrongdoing, Wrage said.

In the past, companies were well-advised to find a problem, fix it and put in proper controls, but not necessarily disclose unless the issue was material under the Sarbanes-Oxley Act, Wrage said. The new incentives for whistleblowers dramatically changes the calculation for disclosure.

“The whistleblower bounty creates a race to the front door of the enforcement agencies,” Wrage said. “It’s unfortunate because it gives employees an incentive to go to the government rather than the compliance officer or audit committee.”

The disclosure dilemma is particularly difficult to navigate because the risks and rewards of the process mean different things to company personnel.

“We see a tension in some companies, where the legal and accounting departments strongly favor reporting, while senior management and board members are often a bit baffled at the prospect,” Wrage said. “The company has no obligation to report and the benefits of disclosure remain unclear, but the downside is obvious and costly.”

Wrage pointed out that the U.K.'s emerging counterpart to the FCPA, the U.K. Bribery Act, further complicates the self-reporting predicament.

Rather than simplify the equation by bringing in a parallel trans-Atlantic statute, the Bribery Act exacerbates the uncertainties by preserving the courts' power to disregard settlements companies reach with the U.K. Serious Fraud Office following disclosure, Wrage said.

"Matters get pretty muddy if you choose to disclose in the U.S., but have operations in the U.K. and don't disclose there at the same time," Wrage said. "And with other countries joining the enforcement fray, you could quickly find that any benefit you expected to reap from disclosure in the U.S. turns into a protracted battle on two or more fronts."

It may appear that companies are damned if they do report potential violations, opening a Pandora's box of investigations, and damned if they don't, risking a punitive response from the government, but a vigorous compliance program is the best way for companies to avoid entanglements in the first place.

Ironclad internal controls may not eliminate the disclosure dilemma, but it reduces the uncertainty as well as the liabilities, allowing companies to both deal with misconduct and temper a potentially draconian response from the government, Volkov said.

"The best way forward is for companies to overhaul their compliance programs, fully investigate and address any potential issues, and then sit tight," Volkov said. "If the government eventually calls, the company can walk in with its head held high and show that it went above and beyond to deal with the problem."

--Editing by Anne Urda and Greg Ryan.