White Collar Crime Report™

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Bribery

As Complexity of FCPA Cases Increase, Corporate Interest in Self-Disclosure Flags

BNA Snapshot

FCPA Compliance

Advice: To best steel themselves from and against FCPA enforcement actions, and subsequent economic harm, companies should bolster the effectiveness of their compliance programs.

Background: The advice comes from Mayer Brown partners amid recent shifts in government policies, which have complicated the utility of voluntary self-disclosure of FCPA violations.

By Yin Wilczek

Dec. 22 — Increasing globalization and shifting government policies have made the calculus for voluntary self-disclosure of Foreign Corrupt Practices Act violations more complex than ever, and the uncertainty is discouraging some companies from making the effort, Mayer Brown LLP attorneys told Bloomberg BNA.

In a Dec. 16 interview, Mayer Brown partners Laurence Urgenson and Audrey L. Harris, from the firm's Washington office, said voluntary self-reporting of FCPA violations has become less appealing because companies now find they can't control the consequences of their disclosures.

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>
> *Laurence Urgenson*
> *Mayer Brown*

The attorneys also said that given the increasing complexity and sophistication of FCPA enforcement, companies' best protection is an effective compliance program.

Such a program will not be fail-safe, and problems still may occur, Urgenson said. However, "the big sell to companies in terms of compliance is not only the ethical basis for it, but the business basis" as well, he said. "It's the closest you can come to an insurance policy against an enormous risk which does real damage to the company."

Formerly 'Safe' Option

In the past, voluntary self-disclosure of FCPA violations was a "relatively safe option" because "you had one-stop shopping" with the Department of Justice and the Securities and Exchange Commission, and companies could obtain a fairly predictable result in which the collateral consequences were measurable, Urgenson said.

Now, however, there has been a "one-way ratchet in a whole spectrum of things which are going up and up and up in terms of risk and exposure" for companies, he said. As a result, voluntary self-disclosure generally "is not favored the way it used to be by corporations."

When companies assess whether to approach the government about a possible FCPA violation, they in effect are "making a business assessment based on a detection risk," Urgenson said. The attorneys noted that in the analysis, companies must take into account many factors, including the potential for:

- simultaneous or successive enforcement actions by other jurisdictions;
- expanded FCPA enforcement by U.S. authorities that may implicate other statutes and regulations, such as anti-money laundering and antitrust requirements;
- debarment from projects funded by the World Bank and other multilateral development banks, the U.S. Export-Import Bank and nongovernmental organizations;
- follow-on derivative actions;
- contractual civil lawsuits in foreign jurisdictions by contractors and other third parties that companies stop doing business with; and
- whistle-blowers tipping off the SEC and other regulators.

More Complicated

The increasing globalization of and collaboration in anti-corruption efforts has made the work of general and defense counsel more complicated, Urgenson said. He suggested, for example, that China's nascent anti-bribery regime "will have ripple effects throughout the world" given the country's economic force. At the same time, companies can't assume that China will take the approach of the U.S. authorities.

In the changing environment, “the legal services that you have to provide are much broader,” he said. “So you can envision a situation where you have something happen in the U.K. or China, where the effort is equally divided between dealing with the SEC and the DOJ and dealing with the U.K. [Serious Fraud Office] and Chinese agencies, knowing that the non-U.S. countries can have entirely different processes, penalties and components.”

The attorney also noted that the World Bank now has a very expansive and sophisticated anti-bribery enforcement regime that differs from that of the SEC and the DOJ. Companies “have a whole new enforcement process” to take into account, Urgenson said. He cited as seminal the 2009 settlement between Siemens AG and the World Bank to resolve bribery allegations in Russia (04 WCR 497, 7/17/09).

In the agreement, Siemens agreed, among other measures, to pay $100 million over 15 years to aid global anti-bribery work and to refrain from bidding for World Bank business for two years.

Debarment from projects financed by the World Bank and other developmental banks can have significant business implications for companies, especially those in the construction industry, Harris said. “In any type of infrastructure in any of the developing world, you're likely to run across at least one or two projects that are financed by the World Bank, a development bank or Ex-Im,” she noted.

U.S. Enforcement Trends

On the domestic front, certain enforcement trends have injected more uncertainty into the self-disclosure calculation, the attorneys told Bloomberg BNA. They observed, for example, that the DOJ, the SEC and other regulators have been steadily increasing their monetary penalties. And as already large FCPA fines increase, that leads to an increase in corporate exposure to stock-drop litigation because of the impact on stock prices, they said.

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With regard to high penalties, French engineering concern Alstom SA reportedly is close to settling a foreign bribery case with the DOJ for a record $700 million, which would be the largest penalty paid to the department under the FCPA (see related story).

Urgenson also noted that the SEC and the DOJ have been diverging over FCPA enforcement, so that a company may have to defend against very different allegations based on the same facts. He cited the enforcement action against Bio-Rad Laboratories Inc., in which the company agreed to pay a $14.3 million criminal penalty to the DOJ and $40.7 million to resolve SEC allegations (09 WCR 772, 11/14/14).

In that case, the SEC's charges were much broader than the DOJ's, Urgenson said. “There was a time when pretty much the SEC charge and the DOJ charge were the same,” he said. “That's less so now.”

Urgenson said that there are many instances in which the SEC goes it alone under the FCPA, and in other instances in which the same defendant faces disparate charges from the SEC and the DOJ over the same investigation, with “the SEC almost always being more aggressive.” The attorney partially ascribed the SEC's aggressiveness to its new “broken windows” policy, in which SEC Chairman Mary Jo White has vowed to pursue smaller violations with a view to changing the compliance landscape.

Other commentators have pointed to the commission's FCPA action against Smith & Wesson Holding Corp. as an extension of the s “broken windows” strategy (09 WCR 529, 8/8/14).

Focus on Individuals

Moreover, the DOJ and SEC's focus on individuals in the FCPA arena has ramifications for companies' consideration of whether to voluntarily self-disclose, Urgenson said.

Cases against individuals impact the “whole FCPA enforcement environment” and heighten corporate exposure, Urgenson said. “When the company makes a calculation as to cooperation and voluntary disclosure, one of the things it has to contemplate is it's far more likely that individuals will be involved in enforcement actions, which also increases costs, expense and duration.”

Unlike companies, individuals are more willing to go to trial than settle their FCPA allegations because, in some cases, they face bankruptcy or a prison term. Accordingly, cases against individuals also may impact the law, Urgenson said. Trials will test “what the law means, because right now a good part of what passes for the law is really the interpretations of settlements, which have never been through a court process or challenged in any serious way in terms of the legal merit,” he said.

Kara Brockmeyer, chief of the SEC's FCPA Enforcement Unit, said in October that the commission continues to focus on individuals despite certain litigation setbacks in such cases (09 WCR 744, 10/31/14).

FCPA Gray Areas

In yet another complication, there remain many gray areas in interpreting the FCPA, the attorneys told Bloomberg BNA. Urgenson noted that despite the U.S. Court of Appeals for the Eleventh Circuit's ruling in *United States v. Esquenazi*, 752 F.3d 912, 2014 BL 136610, 09 WCR 342 (11th Cir.2014), it remains an open question as to whether foreign entities that are more in the nature of commercial enterprises—such as a travel agency in which the government has an interest—constitute an “instrumentality” under the foreign bribery law.

The U.S. Supreme Court denied a certiorari petition on the question (09 WCR 703, 10/17/14).

The FCPA bars U.S. entities from bribing a “foreign official,” which includes “any officer or employee of a foreign government or any department, agency, or instrumentality thereof.”

Harris also noted that there are open questions as to whether 1934 Securities Exchange Act § 13(b)—the SEC's internal accounting controls provision—applies to all FCPA compliance elements. Through its settlements, the commission has taken the position that the provision can be widely interpreted, she explained. “I think there's a strong position to fight back and make the alternative argument that internal accounting controls means what it says, accounting controls,” Harris said. “That's an area that I think hopefully will be coming to the forefront.”

Urgenson agreed, noting that the SEC has been very aggressive in enforcing the provision under the FCPA. “That is an issue that is going to be the subject of lots of settlements, lots of negotiations, and hopefully some cases at some point so the courts can speak to it,” he said.

Most recently, Avon Products Inc. was accused of violating the FCPA by bribing Chinese officials. Avon's Chinese subsidiary pleaded guilty Dec. 17 and agreed to pay a $67.7 million criminal fine, ending a six-year probe (see related story).

Encouraging Self-Disclosure

There are things that the government can do to emphasize the benefits of voluntary self-disclosure, which remain difficult to quantify, Urgenson said. He said one message the SEC and the DOJ are beginning to communicate is that companies are in a better position to negotiate the scope of investigations if they voluntarily come forward with information, “which is an important message.” He noted that the scope of investigations is a significant issue, given that it drives the costs and time that companies have to devote to the matter.

Harris added that the ability to control the FCPA investigation is one of the factors that companies must take into account in deciding whether to voluntarily self report. “When you go into voluntary self-disclosure, one of the pros is to have the opportunity” to make a presentation to the agencies on how wide the scope of the investigation should be and to potentially control the internal investigation, she said. That's better than “receiving a subpoena with an endless scope that you cannot control later on.”

Meanwhile, companies have become much more sophisticated in their FCPA compliance efforts, and the government players have become much more sophisticated in evaluating the effectiveness of compliance programs, Urgenson observed.

“The standard for what is regarded as an effective compliance program is always evolving, and it too is a one-way ratchet,” Urgenson said. “The government is expecting more and more sophistication in order for them to give you the Good Housekeeping seal of approval.”

Emphasis on ‘Effective’ Compliance

Harris noted that based on what SEC and DOJ officials have recently said, an effective compliance program should consist of:

- risk assessment, including geographical, business model and internal risks;
- implementation of FCPA policies and procedures; and
- testing.

In assessing risks, companies should be considering how many “FCPA touchpoints” they may have, Harris said. Companies should identify their interactions with the foreign government, either through third parties or as customers or regulated entities, identify their sources of risk and establish compliance policies around those, she said.

The government has gone beyond “paper programs” to now asking: are companies really implementing their policies, Harris added. She also noted that in testing, the regulators want to know whether companies are auditing their policies and procedure to ensure they are working.

“That has been the evolution, from being able to put down your basic policies and procedures, to now, how are you proactively dealing with your partners, how are you proactively testing your internal processes, and how are you assessing your risks, every year, on an ongoing basis,” she said.

For smaller companies that may lack the resources big organizations have, Urgenson suggested that they use the DOJ and the SEC's joint FCPA resource guide and follow it “the best they can.”

That way, “you can say to the SEC and the DOJ, first of all, that you know what they're saying, and here's how we have adapted it to our company,” he said.

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