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A Fresh Look At The FCPA

The Editor interviews ***R. Christopher Cook****, Partner, Jones Day.*

Editor: Please briefly describe your practice involving both foreign and domestic corporations in relation to the Foreign Corrupt Practices Act.

Cook: My Foreign Corrupt Practices Act practice consists of four primary components: (1) assisting companies as they investigate possible violations and, where found, helping them to decide how to respond to potential violations; (2) defending companies and individuals when they are the subject of investigation by the DOJ or the SEC; (3) counseling companies on the FCPA due diligence that they should undertake in the context of corporate transactions, and (4) counseling corporations regarding compliance efforts with respect to the FCPA, including developing and monitoring policies and education programs.

Editor: The Justice Department and SEC have stepped up their prosecution of cases under the FCPA. Why has this happened?

Cook: The DOJ and SEC clearly have increased their FCPA enforcement efforts over the last several years. A number of factors have contributed to that increase. First, the economy has become much more globalized in the last decade. Every year, more U.S. companies are doing business overseas, particularly in the developing world where the chances are statistically higher that they will be solicited for a corrupt payment. A second factor is the manner in which many domestic companies expanded overseas – either by purchasing or opening subsidiaries in developing countries without establishing strong control and oversight. In many instances, this resulted in those operations being run without a sufficient sensitivity to U.S. laws.

A third driver in the increase in FCPA enforcement has been a growing international consensus that corruption must be eliminated because it is bad for business and injurious to the public good. That is, corruption in poor countries sustains oligarchies and disrupts the growth of a functioning market economy. And so we've seen a number of international efforts to reduce corruption both for the altruistic motivation of helping developing countries in addition to creating a better environment for business. The Organization for Economic Cooperation and Development, the United Nations, the Organization of American States, the World Bank and the International Monetary Fund all have been working to reduce corruption and to ensure that money spent in developing nations is not used to fund bribes. Increased FCPA enforcement is part of that effort. In fact, the United States has been the driving force behind the international movement towards the codification of anti-corruption laws in other countries so as to level the playing field between U.S. and foreign businesses.

R. Christopher Cook

Finally, high profile reports of international corruption have raised public awareness. To pick only one example, the UN Oil-for-Food scandal involved widely reported allegations of bribes paid to the Saddam Hussein regime. And remember that news reports of overseas bribery motivated the passage of the FCPA back in 1978. It's no secret that publicity can drive action by prosecutors. Investigations of foreign bribery are no exception.

Editor: What should domestic corporations do to avoid investigations and prosecutions?

Cook: The most effective way to avoid FCPA investigations is to pay attention to your compliance program by enacting anti-corruption policies, educating your employees, monitoring effective implementation and investigating potential violations. This sort of deliberate approach to compliance takes time and resources, but the payoff can consist of avoiding a costly investigation.

Editor: What is the OECD's position on prosecution of facilitating type payments to foreign officials and how does it disagree with the position taken by the U.S. government?

Cook: The OECD has recently changed its position on facilitating payments, commonly known as "grease payments." It announced in late 2009 that member countries should consider changing their laws to prohibit such facilitating payments. You will recall that when the countries in the OECD first enacted the Convention on Combating Bribery of Foreign Public Officials in the late '90s, that Convention followed FCPA's position of allowing facilitating payments. Over the years, however, it has become clear that this facilitating payments exception is hard to administer, inasmuch as it is difficult to distinguish between a permissible facilitating payment and an impermissible bribe. The distinction between the two turns not on the size of the payment, but the amorphous concept of a foreign official's "discretion." For example, a payment to schedule a customs inspection could be a facilitating payment, but if it is used to jump ahead of other competitors in line in a busy port, that could be considered a bribe. Obviously, it is very difficult for companies to provide clear guidance to their employees and officers regarding this exception.

Moreover, the OECD found that allowing some corrupt conduct is corrosive to the greater goal of eliminating official bribery. Thus, the OECD has suggested that member countries re-examine their laws and consider eliminating any exception that permits facilitating payments.

Whether the U.S. will amend the FCPA as suggested by the OECD is an open question, but the odds that we will see an effort to do so seem high. Of course, few U.S. companies rely on the facilitating payment exception to the FCPA, if for no other reason than it is fantastically difficult to write a pol-

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icy that allows for facilitating payments but prohibits bribes. Thus, if the law is changed, it may have little impact on how business operates.

Editor: Could you explain why there has been a shift in prosecutions from corporations to officers of corporations and individuals?

Cook: The DOJ has made it crystal clear that they will prosecute more individuals under the FCPA. In many ways that is the same policy you've seen the DOJ follow in a host of white collar criminal contexts, including health care and securities fraud. The government's stated position is that the FCPA is a criminal statute and that corporations act only through individuals. Thus, if an individual chooses to make a corrupt payment and therefore violates the FCPA, the government intends to prosecute that individual. The DOJ also believes that creating a risk of criminal prosecution for individuals will change conduct more than simply imposing fines on corporations. And, in fact, individual prosecutions under the FCPA have risen to historic levels with defendants going to prison for several years for violating that law. The danger here, in all white collar criminal enforcement, is that the DOJ will overreach and seek to impose criminal liability under a shifting legal standard. For example, if the government makes clear for the first time in 2010 that certain conduct violates the FCPA, it would be unfair for the government to prosecute an individual for having engaged in that conduct in 2007.

Editor: Wouldn't that be a retroactive application of the law?

Cook: That is my concern. Now, the government would argue that the law was there all along, so this is not a retroactive application. The difficulty is that white collar crimes often involve difficult questions of interpretation. It is not always simple to draw the line between permitted business conduct and the corrupt payments that are prohibited by the FCPA. My hope is that the DOJ shows good judgment by initiating prosecutions under the FCPA only where the conduct at issue was clearly illegal at the time it took place.

Editor: What is the U.S. government's attitude toward bribes paid under the guise of "willful blindness"? What is the standard by which "knowledge" is measured under the FCPA?

Cook: That is a fascinating legal question right now, and the standard is really open to interpretation. As in many areas of the law, the FCPA purports to impose liability without requiring the government to prove actual knowledge. For example, if someone pays an agent, but doesn't actually know that the money will be used to pay a bribe, the payment still may violate the FCPA if the payor acted with willful blindness. The government takes a very expansive view of willful blindness under the FCPA, arguing that the person making the payment can be guilty if he ignored red flags suggesting that a bribe would be paid. But this position by the government comes dangerously close to imposing criminal liability upon someone just for being negligent in not asking enough questions, and that is not a crime under the FCPA. There have been very few cases that have dealt with this matter, but with the increase in individual prosecutions by the DOJ we can expect to see this distinction between willful blindness and negligence play an important role.

Editor: Are companies more vulnerable to FCPA actions if they are in certain industries or conduct business in certain countries?

Cook: Historically and statistically, yes. Certain industries and certain regions are more dangerous for companies from an FCPA perspective. There are two characteristics that appear to be critical in that regard. First, if a company is in an industry with deep government involvement, it is more likely to deal with individuals who can be characterized as government officials. That alone increases risk under the FCPA. Second, in countries where the rule of law is weak, officials are more likely to solicit bribes.

Editor: What type of compliance steps should a company take to ensure that its officers and outside partners understand the impact of the FCPA violations?

Cook: Internally, this is matter of setting rules and communicating them. This usually involves a combination of written communications, live presentations, online courses and video training. These need to be technically correct but also truly designed to teach the recipient, often across a cultural or language barrier.

Externally, the company must unambiguously establish its position on FCPA compliance when dealing with business partners. Contractual arrangements, for example, must make very clear what conduct the company will not tolerate. But equally important, the company must choose its business partners wisely. If a company has any doubt about the ethics or the reliability of a business partner, it should address the issue quickly. And if doubts remain, the company should limit or terminate the relationship to the extent possible.

Editor: Is there any benefit to proactively self-reporting any internal detection of a violation?

Cook: That is the most difficult question now facing companies that learn of potential FCPA violations. In many circumstances, companies have realized a benefit from self-reporting violations. Even so, there remains a lack of clarity as to when a company should self-report and what benefits will accrue from such a course of action.

Editor: Why do you believe the DOJ is now looking at closer scrutiny of the pharmaceutical industry?

Cook: The DOJ has made very clear that it is looking at health care overseas as a possible area of increased FCPA scrutiny. Because so many foreign customers of health care companies are government-owned, the employees of these customers can be characterized as government officials. If you have a state-owned entity that is purchasing health care supplies, pharmaceuticals or medical devices, the government will take the position that the employees of that company are government officials for purposes of the FCPA. The DOJ also has indicated that it intends to coordinate the efforts of its FCPA prosecutors and its healthcare fraud prosecutions. It appears that the DOJ hopes to import to the FCPA context some of the knowledge it has developed in the U.S. investigating health care companies.

Editor: What are the legal penalties for violating the FCPA? What other business risks may be concomitant with a prosecution under the Act?

Cook: The FCPA is a criminal statute. Individuals who are found to violate the law can go to prison, companies and individuals can pay millions of dollars in fines, and companies can be barred from doing business with the government. Individuals can also be barred from working for publicly traded companies because the SEC shares enforcement authority under the FCPA. The real question that remains to be answered under the FCPA is whether companies will be subject to follow-on civil litigation. We have not seen a lot of that as we have in other criminal areas. While we hope that continues to hold true, early indications suggest that FCPA-related civil litigation will increase in the coming years.