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FCPA: Ethical Beacon Or Anti-Competitive Burden?

Law360, New York (February 01, 2012, 12:30 PM ET) -- The Foreign Corrupt Practices Act was enacted in the surge of public morality following the Watergate Scandal and in response to a congressional investigation uncovering widespread bribery among domestic companies operating overseas. While the statute has the unquestionably noble goal of eliminating corruption and holding United States concerns to a high standard of morality, it has come under recent criticism for the substantial and, some would say, anti-competitive, costs that it imposes.

Regardless, the government is committed to strong and vigorous enforcement of the FCPA, and, in fact, private plaintiffs are finding creative ways to use the FCPA to their advantage. In such an environment, the best a company can do is to implement a robust compliance protocol and to keep an eye out for circumstances that allow it to use the FCPA to its own advantage.

Introduction

The FCPA has two general provisions: the anti-bribery prohibition and accounting requirements. The anti-bribery provisions generally prohibit the paying of bribes to a foreign official to obtain or retain business, and they apply to "issuers" (companies with securities registered in the United States), "domestic concerns" (any business entity organized under the law of a state or with its principal place of business in the United States, as well as United States citizens), and any person or company (including foreign individuals or companies) that engages in a corrupt act while in the territory of the United States. The accounting provisions apply only to issuers and require them to keep books and records that accurately reflect their business transactions and to maintain effective internal controls.

Violations of the FCPA carry stiff penalties. Companies that violate the anti-bribery provisions can be subject to a fine of up to \$2 million per violation, as well as a civil penalty of \$10,000. And individuals who "willfully" commit such violations are subject to a per-violation fine of up to \$100,000 and five years imprisonment, as well as a \$10,000 civil penalty. Violations of the accounting provisions can lead to fines up to \$25 million for companies and \$5 million for individuals and up to 20 years imprisonment.

Increased Enforcement and Increased Criticism

It is no secret that the government is prioritizing FCPA enforcement, and this increased enforcement has led to increased criticism. In December 2011, the New York City Bar Association's Committee on International Business Transactions issued a report critical of the FCPA, and, perhaps more significantly, its enforcement.[1] It noted that the FCPA imposes substantial compliance costs on companies subject to its jurisdiction — costs that their foreign competitors may not face.

It also lamented the seemingly unchecked prosecutorial power to obtain huge settlements in FCPA cases, as the consequences of an FCPA indictment are potentially fatal to a company, and, as a result, most companies are willing to settle for large sums — regardless of whether they believe the allegations are valid. Indeed, as the report notes, in April 2011, each of the eight top fines for FCPA "violations" exceeded \$100 million.

This report followed a similar-type analysis from the United States Chamber of Commerce, issued in October 2010,[2] which noted that companies suspected of FCPA violations "shoulder the cost

of uncovering such violations themselves through extensive internal investigations” and that, “[f]rom the government’s standpoint, it is the best of both worlds. The costs of investigating FCPA violations are born by the company and any resulting fines or penalties accrue entirely to the government.”

The report expressed the concern that the U.S. Department of Justice is both prosecutor and judge in the FCPA context and that some U.S. companies have ceased foreign operations in the face of the uncertainty of FCPA enforcement. To that end, the report makes a number of recommendations to reign in the FCPA, such as adding a “willfulness” requirement before imposing liability on corporations, which can currently be criminally liable without having knowledge of the wrongful conduct, to ensure that only those companies that intend to violate the law are subject to the harsh fines, as well as a provision limiting a company’s successor liability for the premerger FCPA violations of a company that it acquired.

The proposals have been sharply rejected by the government. Assistant Attorney General Lanny Breuer recently said:

I am aware that there have been a number of efforts made this year to amend the FCPA, by the Chamber of Commerce and others. ... [W]e have no intention whatsoever of supporting reforms whose aim is to weaken the FCPA and make it a less effective tool for fighting foreign bribery. Indeed, at this crucial moment in history, watering down the Act — by eliminating successor liability in the FCPA context, for example — would send exactly the wrong message.[3]

In an attempt to ameliorate the anti-competitive effects of the FCPA on domestic companies, Rep. Ed Perlmutter, D-Colo., introduced a bill in November 2011 into the House of Representatives called the Foreign Business Bribery Prohibition Act of 2011. This bill would allow issuers, domestic concerns and United States persons (all entities subject to the FCPA) to sue any “foreign concerns” that violate the anti-bribery provisions and cause damages to the authorized plaintiffs.

A foreign concern is essentially any person or entity (other than an issuer, domestic concern or United States person) that violates the FCPA while in the United States. While this statute would arguably level the playing field by allowing domestic companies to sue foreign companies that use bribery to gain a competitive advantage, as well as by imposing FCPA-compliance costs on a wider net of companies, the bill has not yet been passed by the House.

Using the FCPA Offensively, or, If You Can’t Beat ‘Em, Join ‘Em

The FCPA does not contain a private right of action. In other words, only the government can enforce the statute. But, private plaintiffs have steadily found creative ways to use FCPA violations as predicate acts in private causes of action. These private actions are often “parasitic” in that they are usually commenced after a government investigation has become public, and they use admissions and settlements in the government context to further their own causes of action.

For example, in 2010, Innospec Inc. plead guilty to violating the FCPA by bribing officials in Iraq and Indonesia to ensure sales of its product in those areas. It agreed to pay \$14.1 million in penalties and to retain an independent compliance monitor for three years to oversee the imposition of an anti-corruption compliance protocol. On the same day, it also settled a civil complaint with the U.S. Securities and Exchange Commission, requiring it to disgorge \$11.2 million in profits.[4]

After Innospec plead guilty, its competitor, NewMarket Corp., brought claims against it for

antitrust violations.[5] NewMarket claimed that Innospec paid bribes to the Iraqi and Indonesian governments so that those governments would favor Innospec's product, would not transition to NewMarket's product, and would therefore maintain Innospec's monopoly in those markets.

Significantly, NewMarket's principal financial officer, David Fiorenza, said that it was only after reading about the plea that he learned about Innospec's actions[6] — knowledge that would ultimately form the basis of NewMarket's complaint. This case ultimately settled in October 2011 when Innospec agreed to pay NewMarket \$45 million dollars.[7]

The ability of corporations and individuals to make use of the FCPA offensively, as opposed to simply defensively incurring costs of compliance, is a new horizon. Conduct violating the FCPA can violate numerous other statutes as well — including statutes with a private right of action — such as the Racketeer Influenced and Corrupt Organizations Act, securities fraud and, as in the Innospec case, antitrust laws.

And, parasitic FCPA actions have the benefit of allowing the government to be the driver of the case to the point where, as discussed above, companies pay large sums in settlement and even plead guilty. The government investigation and subsequent guilty pleas can save private plaintiffs from doing the typical legwork required in prosecuting a complex case on their own. Because the FCPA doesn't seem to be going away, companies should look for opportunities to use the law to their advantage.

A Necessary Burden: How to Implement a Compliance Program

The opportunity to use the FCPA to a company's advantage will likely be a fortuitous circumstance, but the importance of implementing compliance programs is a run-of-the-mill, daily obligation, the importance of which cannot be overstated.

When developing an anti-corruption compliance program, companies should keep in mind that the FCPA is not the only law prohibiting bribery — most developed countries have adopted legislation making it a crime for their citizens to bribe foreign officials — and, therefore, companies must develop a uniform global standard of compliance.

Such a standard should reflect the following general principles:

- a clearly articulated and visible corporate policy prohibiting foreign bribery;
- strong, explicit and visible support and commitment from senior management to the company's compliance program;
- maintenance of anti-corruption standards and procedures that are reasonably designed to reduce the potential for corruption (e.g., policies regarding gifts, entertainment, political contributions and charitable donations) and that are applicable, and effectively communicated to, all directors, officers, employees, and, where necessary and appropriate, third parties acting on behalf of the company in a foreign jurisdiction; [8]
- continual risk assessment focusing on the particular bribery risks facing the company, such as the country where the company does business,[9] the degree of interaction with government officials, governmental oversight and inspection, the industrial sectors of operation,[10] the degree of involvement in joint venture arrangements, the importance of licenses and permits in the company's operations, and the volume and importance of goods and personnel clearing through customs and immigration;
- maintenance of appropriate due diligence requirements pertaining to the retention and oversight of all agents and business partners and transparent and ethical business relationships so that the company knows with whom it is dealing at all times;

- encouragement and support for observing the compliance program at all levels of the company, including making it clear to all that each individual of the company has a duty to comply with the program;
- maintenance of disciplinary procedures to address violations of global anti-corruption laws and the company's anti-corruption compliance program by the company's directors, officers and employees; [11]
- Maintenance of fair and accurate books, records, and accounts to ensure that they cannot be used for the purpose of foreign bribery or concealing such bribery.

While the above principles are necessary for any effective compliance program, the existence of such a program is not a complete defense under the FCPA, unlike the U.K. Bribery Act of 2010 and similar anti-corruption laws in many other countries.[12] In other words, a company with a top-notch compliance program would have a legal defense to charges of bribery under the U.K. Bribery Act, whereas the same company would have no such defense under the FCPA.

The lack of a "compliance defense" is particularly problematic in the successor liability context, as a company does not have a defense under the FCPA for the corrupt actions of an acquired company, even if the acquiring company adhered to its compliance program by conducting a rigorous due diligence investigation, although ultimately failing to uncover the corrupt acts.

In light of the government's resistance to efforts to amend the FCPA and the pace of recent FCPA enforcement, the addition of a corporate willfulness requirement or a compliance program defense is unlikely in the short term. Nor can one expect to see the elimination of successor liability. With this legal environment, companies should focus on effectively implementing a compliance program, while actively looking for opportunities to ensure that other companies (particularly competitors) are not able to reap the benefits of illegal acts.

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[1] The FCPA and its Impact on International Business Transactions — Should Anything be Done to Minimize the Consequences of the U.S.'s Unique Position on Combating Offshore Corruption?, New York City Bar Association, (Dec. 2011), <http://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf>.

[2] Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act, U.S. Chamber of Commerce (Oct. 2010), <http://www.uschamber.com/reports/restoring-balance-proposed-amendments-foreign-corrupt-practices-act>.

[3] Assistant Attorney General Lanny A. Breuer, United States Department of Justice, Address at the 26th National Conference on the Foreign Corrupt Practices Act in Washington, DC (Nov. 8, 2011), <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html>.

[4] Press Release, Department of Justice, Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding United Nations; Admits to Violating the U.S. Embargo Against Cuba (March 18, 2010), <http://www.justice.gov/opa/pr/2010/March/10-crm-278.html>.

[5] Second Amended Complaint ¶ 1, Newmarket Corp. v. Innospec Inc., No. 3:10-cv-00503 (E.D.

Va. Jan. 27, 2011) (ECF No. 41).

[6] Emily C. Dooley, Richmond firm claims in suit that competitor paid kickbacks to Iraqis, Richmond Times- Dispatch (Aug. 5, 2010), at B-03.

[7] Bruce Carton, Company Allegedly Bumped Out of Contract by Rival's Corruption Recovers \$45 Million in Civil Settlement, Compliance Week, (Oct. 5, 2011), <http://www.complianceweek.com/company-allegedly-bumped-out-of-contract-by-rivals-corruption-recovers-45-million-in-civil-settlement/article/213666/>.

[8] The company should periodically review (no less than annually) such standards and procedures, and update them to take account of developments in the field and evolving international and industry standards. To ensure effective communication of the standards and procedures, the company should provide periodic training at all levels of the company and document such training.

[9] For example, Russia, China and Mexico are consistently ranked among the countries with high levels of government corruption. See Transparency International, Corruptions Perceptions Index 2010, available at: http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results.

[10] Public works contracts and construction, utilities, real estate, oil and gas and mining are sectors where bribery is perceived to be prevalent. See Transparency International, Bribe Payers Index 2011, available at: http://www.transparency.org/publications/publications/bribe_payers_index_2011.

[11] The company should also provide an effective system for confidential reporting by, and protection of, directors, officers and employees who wish to seek guidance and/or report a violation;

[12] The anti-corruption laws of Australia, Chile, Germany, Hungary, Italy, Japan, Korea, Poland, Portugal, Sweden and Switzerland all contain a compliance defense.

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