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The FCPA Needs More Regulatory Clarifications for Businesses

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In a recent, insightful article that appeared in the Business Lawyer, Jim Doty of Baker Botts' Washington, DC office makes a strong argument about why the SEC needs to promulgate an FCPA regulation—"Regulation FCPA"—to provide safe harbors that businesses could take advantage of when structuring their operations so that they are fully compliant with the FCPA, thereby removing unnecessary costs and risks that businesses operating in today's global markets encounter. *See* James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, The Business Lawyer 62(4): 1233–1256 (August 2007) (*available to* members of the ABA Section of Business Law at www.abanet.org/buslaw/tbl/tblonline/2007_062_04/home.shtml). The scarcity of advisory opinions provided by the U.S. Department of Justice in the years since the FCPA has been on the books demonstrates a real need for more regulatory clarity and certainty.

The Opinion Procedures are codified in Title 28 of the Code of Federal Regulations Part 80, and are *available at* http://www.usdoj.gov/criminal/fraud/fcpa/opinion/frgncrpt.html. Under the procedures, a party seeking to use the FCPA Opinion Procedures must inquire about a real transaction and the request must be made *before* a party has committed to the transaction. *See* 28 C.F.R. §80.3. If the request meets all requirements, a party can obtain relative clarity about the legality of the transaction—at least as to the DOJ's *present* likelihood of enforcement:

> In any action brought under the applicable provisions of 15 U.S.C. 78dd-1 and 78dd-2, there shall be a rebuttable presumption that a requestor's conduct, which is specified in a request, and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department's present enforcement policy, is in compliance with those provisions of the FCPA. *Such a presumption may be rebutted by a preponderance of the evidence*. . . .

28 C.F.R. §80.10 (emphasis added).

The FCPA is hardly a model of clarity. So few cases have been litigated that courts have not had many occasions to fill in some of the apparent gaps not addressed in the Act by Congress and the regulators. As pointed out by one commentator, the FCPA's provisions remain hard for businesses conducting operations outside the United States to fully comply with in part because Congress attempted to legislate morality in the Act for how domestic businesses should operate in our nation and others:

> The United States is increasingly using its securities laws to try to govern the behavior of corporations - and their employees - as well as that of U.S. citizens abroad. By requiring businesses and individuals to adhere to a U.S. model of behavior when acting overseas, the United States exerts a kind of moral imperialism that imposes U.S. business standards and ethics on transactions occurring wholly outside of the United States; these transactions even include those conducted through remote subsidiaries using foreign employees with little or no understanding of these U.S. based models of behavior. . . .

Aaron G. Murphy, *The Migratory Patterns of Business in the Global Village*, 2 N.Y.U. J. L. & Bus. 229, 230 (2005).

While apologists for the FCPA may argue that the Act already provides sufficient leeway for businesses, noting that they can engage in activities that host jurisdiction recognize as being lawful, this argument is naive because the provision in question, 15 U.S.C. §78dd-1(c)(1) ("the payment, gift, offer, or promise of anything of value . . . was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country"), is an affirmative defense that often will not be available. This is because many common business practices or customs have not yet been enacted as law. In one reported case, *D'Agostino v. Johnson & Johnson, Inc.*, 133 N.J. 516, 628 A.2d 305 (N.J. 1993), this provision was construed in a wrongful termination suit by a Swiss resident who had been employed with Swiss subsidiary of New Jersey corporation and who alleged he was wrongfully terminated for refusing to go along with bribing a Swiss official to obtain approval for J&J's pharmaceutical products. The company relied upon this affirmative defense provision to the FCPA. The appellate court observed, inter alia, that the Swiss Public Prosecutor had found the bribery allegation to be unsubstantiated, explaining "We are not evaluating the propriety of this form of conduct under Swiss law. We are informed, however, that Swiss regulatory practices were changed after the events giving rise to this suit." *D'Agostino*, 133 N.J. at 543, 628 A.2d at 320.

More to Come

For additional information about me, my practice, background and interests, see the following pages (which contain links to some of my published papers and articles: www.avvo.com/attorneys/77007-tx-michael-clark-121553.html and www.superlawyers.com/texas/lawyer/Michael-E-Clark/a051f497-181f-4399-862b-cd4a7ad5c1cf.html

The treatise about pharmaceutical law for which I am Editor-in-Chief was published in December 2007 by BNA/ABA Section of Health Law. *See* http://storefront.bnabooks.com/epages/bnastore.sf/?ObjectPath=/Shops/bnastore/Products/9823