Congressional Hearings for Amendment to the FCPA

At what the FCPA Blog termed "an unprecedented investigation into the Department of Justice's (DOJ) enforcement of the Foreign Corrupt Practices Act (FCPA)", in a hearing on November 30, 2010 entitled the "*Examining Enforcement of the Foreign Corrupt Practices Act*" before the US Senate Judiciary Committee, Subcommittee on Crime and Drugs, three panelists, Butler University Professor Michael Koehler, author of the blog, the "FCPA Professor" and attorneys Andrew Wiessmann of the firm of Jenner and Block and Michael Volkov, of the firm Mayer Brown, presented proposed changes to the FCPA. The witnesses all believe that the changes are required (1) to bring FCPA enforcement into line with Congressional intent; (2) to bring a more balanced approach in providing incentives to companies to comply with the law; and (3) to bring greater certainty and fairness to statutory interpretation and enforcement.

The hearing began with the Subcommittee Chairperson, Senator Arlen Specter, questioning the DOJ's policy of obtaining large fines from corporations, rather than prosecuting individuals, to deter violation of the law. He specifically cited the example of the enforcement action against Siemens Corp., which resulted in a fine of $1.6 billion, yet had no individual prosecutions. He also pointed to the examples of BAE which paid a fine of $400 million and the Daimler Corporation which paid a fine of $185 million and subsequently there have been no individuals prosecuted from either of these corporations. Senator Specter posed the question to the DOJ representative at the Hearing, Greg Andres, as to whether the imposition of fines simply was viewed by companies as a cost of doing business.

Professor Koehler focused on two issues; (1) the lack of individual prosecutions and (2) what he believes is an over-expansive definition of foreign governmental official. In reviewing the DOJ's claim of significant individual prosecutions, Professor Koehler testified:

> *Twenty-two individuals have been in one case, the so-called Africa [Gun] Sting case, in which FBI agents (posing as representatives of the President of Gabon with the assistance of an individual who had already pleaded guilty to unrelated FCPA violations) facilitated fictitious business transactions largely involving owners and employees of military and law enforcement products companies; and*
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> *Twenty-four individuals are or were in cases where the recipient of the alleged payments was not a bona fide foreign government official.*

Additionally, the DOJ's theory of prosecution was based on the claim that employees of alleged [state-owned enterprises] were "foreign officials" under the FCPA – an interpretation Professor Koehler believes is contrary to Congressional intent. Prosecuting individuals is a key to achieving deterrence in the FCPA context and should thus be a "cornerstone" of the DOJ's FCPA enforcement program. He argued that the answer is not to manufacture cases, or to prosecute individuals based on legal interpretations contrary

to the intent of Congress in enacting the FCPA while at the same time failing to prosecute individuals in connection with the most egregious cases of corporate bribery.

Attorney Michael Volkov advocated the adoption of a limited amnesty program for corporate self-compliance with the FCPA. Volkov's proposal consists of the following elements:

1. A participating company agrees to conduct a full and complete review of the company's FPCA compliance program for the five previous years.
2. This internal review is to be conducted jointly by a major accounting firm or specialized forensic accounting firm and a law firm.
3. The company agrees to disclose the results of the legal-accounting audit to the DOJ, Securities and Exchange Commission (SEC), its investors and the public.
4. If the company discovers any FPCA violations in the audit, the Company agrees to take all steps to eliminate the violation(s) and implement appropriate controls to prevent further violations.
5. The company would subject itself to an annual review for five years to ensure that FCPA compliance was maintained.
6. The company would retain a person similar to an independent FCPA compliance monitor who would annually certify to the DOJ and SEC that the company was in FCPA compliance.
7. In exchange for this, both the DOJ and SEC would agree not to initiate any enforcement actions against a company during this period except in the situation where a FCPA violation was found and it "rose to ***flagrant*** or ***egregious*** levels."

Attorney Andrew Wiessmann testified about 2 of his 5 proposed amendments to the FCPA (the full five proposed amendments are set out in Whitepaper entitled "*Restoring Balance-Proposed Amendments to the Foreign Corrupt Practices Act*"). They were to create a compliance defense available to a company if it has an adequate compliance program, similar to the "*adequate procedures"* defense available under the UK Bribery Act.

Under this proposal, Wiessmann believes that companies will increase their compliance with the FCPA because they will now have a greater incentive to do so. He envisions a defense similar to the "*adequate procedures*" defense, noted in the UK Bribery Act, where companies will be protected if a rogue employee engages in corruption and bribery despite a company's diligence in pursuing a FCPA compliance program; and lastly "it will give corporations some measure of protection from aggressive or misinformed prosecutors, who can exploit the power imbalance inherent in the current FCPA statute—which permits indictment of a corporation even for the acts of a single, low-level rogue employee—to force corporations into deferred prosecution agreements."

Wiessmann stated that the institution of a compliance defense will bring enforcement of the FCPA in line with US Supreme Court precedent, which has recognized that it is appropriate and fair to limit the legal doctrine of *respondeat superior* liability where a company can demonstrate that it took specific steps to prevent the offending employee's

actions. Wiessmann argued that businesses may similarly be dissuaded from instituting a rigorous FCPA compliance program for fear that the return on such an investment will be only to expose the company to increased liability and will do little to actually protect the company. A FCPA compliance defense will help blunt this. He concluded by noting "It is unfair to hold a business criminally liable for behavior that was neither sanctioned by or known to the business. The imposition of criminal liability in such a situation does nothing to further the goals of the FCPA; it merely creates the illusion that the problem of bribery is being addressed, while the parties that actually engaged in bribery often continue on, undeterred and unpunished. The FCPA should instead encourage businesses to be vigilant and compliant."

Other commentators have noted that the doctrine of *respondeat superior* puts a company at a great disadvantage in any FCPA enforcement proceeding. In a blog post entitled, "*Quiz Time Answer*", the FCPA Professor explained:

> Individual FCPA defendants tend to work for companies. Under *respondeat superior* theories of liability, the company is going to have a very difficult time "distancing" itself from its employees conduct.

The FCPA Blog went further, opining that the doctrine of *respondeat superior* "does more harm than good" and that corporations are "defenseless once employees are found to have committed [FCPA] violations" in an enforcement action because of the doctrine of *respondeat superior*. In a blog post entitled, "*Naked Corporate Defendants*", the FCPA Blog said:

> Sure, it produces a 100% corporate "conviction" rate in FCPA cases, which must go down well at the Justice Department. But, it probably doesn't deter illegal behavior or encourage better compliance programs. And it puts overwhelming pressure on organizations to resolve threatened criminal cases. Because of the catastrophic effects of any potential conviction, companies have to settle with the government. So they rush into agreements that may require them to waive the attorney–client privilege, hand over employees' private documents and data, cut off support for their legal defense, and fire those who don't cooperate with government investigations.

At this point the debate is only beginning. The FCPA Blog commented, "DOJ stuck to its script. That didn't include talking about what might be wrong with the FCPA and the way it's enforced. But at some point, maybe soon, the DOJ will either be inside the tent, working with others to fix the FCPA in the best ways possible, or outside the tent and looking in." We can only watch, wait and hope that the DOJ will seriously consider some of this commentary and others that may portend the need for an amendment to the FCPA.