

Recent DPAs Provide Guidance on FCPA Compliance *Best Practices*

The House Judiciary Committee will hold hearings Tuesday on the Foreign Corrupt Practices Act. At this point the Witness List as set forth on the Committee's website is as follows:

- **Hon. Michael Mukasey**
Former Attorney General
Partner
Debevoise & Plimpton LLP
- **Mr. Greg Andres**
Deputy Assistant Attorney General
Criminal Division
U.S. Department of Justice
- **Mr. George Terwilliger**
Partner
White & Case LLP
- **Ms. Shana-Tara Regon**
Director
White Collar Crime Policy
National Association of Criminal Defense
Lawyers

At this point no preview of the witnesses' testimony has been released. However, other than Greg Andres, the testimony will probably not be a defense of the FCPA or even the need to expand it to meet the anti-bribery and anti-corruption enhancements found in the UK Bribery Act. Indeed it reads like a list of representatives from the US Chamber of Commerce, which has been engaged in a campaign to amend the FCPA.

However in the past 12 months or so many of the complaints which have practitioners have made regarding the FCPA have been addressed by the Department of Justice (DOJ) or by recent court rulings. I have reviewed the federal district court rulings in the CCI and Lindsey Manufacturing cases, which both discussed the factors which should go into an analysis of what is a foreign governmental instrumentality under the FCPA. So at this point, I thought it might be propitious to review some of the information which has come out from the DOJ on what it considers the current *best practices* for a FCPA compliance program.

Alliance One/Universal Corp.-actions during the pendency of an investigation

Last July, the DOJ released joint Deferred Prosecution Agreement (DPAs) for two companies in the tobacco industry: Alliance One and Universal Corp. These DPAs started a year-long process

by which the DOJ has informed the compliance community about specific steps companies can take to enhance their FCPA compliance program or benchmark their current compliance programs against DOJ suggested *best practices*. These two DPAs in question provided to companies in the midst of FCPA enforcement actions specific steps that should be implemented during the pendency of an investigation to present to the DOJ, which could reduce the overall penalties at the end of the day. Initially it should be noted that full cooperation with the DOJ at all times during the investigation is absolutely mandatory. Thereafter from the Alliance One matter, the focus was on accounting procedures and control of cash payments. From the Universal case, a key driver appears to be the due diligence on each pending international transaction, and subsequent full due diligence on each international business partner. Next is the management of any international business partner after due diligence is completed and a contract executed. Lastly is the focus on the Chief Compliance Officer position, emphasizing this new position throughout the organization and training, training and more training on FCPA compliance.

Panalpina Settlements-Best Practices

In the DOJ settlement with the freight forwarder Panalpina and all related settlements announced on the same day last November, the DOJ attached as Attachment C (Attachment B to the Noble Non-Prosecution) a list of 13 *best practices* which included the collective Corporate Compliance Programs provided the FCPA compliance practitioner with the most current components that the Department of Justice believes should be included in a FCPA compliance program. Hence, this information is a valuable tool by which companies can assess if they need to adopt new or to modify existing their internal controls, policies, and procedures in order to ensure that it maintains: (a) a system of internal accounting controls designed to ensure that a Company makes and keeps fair and accurate books, records, and accounts; and (b) a rigorous anti-corruption compliance code, standards, and procedures designed to detect and deter violations of the FCP A and other applicable anti-corruption laws. The Preamble notes that these suggestions are the “minimum” which should be a part of a Company's existing internal controls, policies, and procedures:

1. Code of Conduct.
2. Tone at the Top.
3. Anti-Corruption Policies and Procedures.
4. Use of Risk Assessment.
5. Annual Review.
6. Sr. Management Oversight and Reporting.
7. Internal Controls.

8. Training.
9. Ongoing Advice and Guidance.
10. Discipline.
11. Use of Agents and Other Business Partners.
12. Contractual Compliance Terms and Conditions.
13. Ongoing Assessment.

The DOJ goes on to fill in each of these categories so that it is a valuable list to create, enhance or benchmark your FCPA compliance program.

Alcatel-Lucent, Maxwell Technologies and Tyson Foods-Risk Assessments

The three enforcement actions, all announced in early 2011, involving the companies Alcatel-Lucent, Maxwell Technologies and Tyson Foods, had common areas that the DOJ indicated were FCPA compliance risk areas which should be evaluated for a minimum best practices FCPA compliance program. In both Alcatel-Lucent and Maxwell Technologies, the Deferred Prosecution Agreements (DPAs) listed the seven following areas of risk to be assessed.

1. Geography-where does your Company do business.
2. Interaction with types and levels of Governments.
3. Industrial Sector of Operations.
4. Involvement with Joint Ventures.
5. Licenses and Permits in Operations.
6. Degree of Government Oversight.
7. Volume and Importance of Goods and Personnel Going Through Customs and Immigration.

In the Tyson Foods DPA, this list was reduced to the following (1) Geography, (2) Interaction with Governments, and (3) Industrial Sector of Operations. As with all DPAs released since the Panalpina settlements, each DPA has included an Attachment C, compliance program *best practices*. However these three DPAs give the compliance practitioner the guidance that the DOJ considers a risk assessment to be the starting point for any compliance program. In addition to this information on the starting point, there are specific risks which should be assessed listed by the DOJ.

Johnson and Johnson-self disclosure and enhanced compliance obligations

I. Self-Disclosure

FCPA practitioners have repeatedly asked the DOJ for specific guidance as to what will be the tangible results of self-disclosure. In the Johnson & Johnson DPA this question is clearly answered. Listed under the section “Relevant Considerations” one of the reasons the DOJ entered into the DPA is the following:

a. J&J voluntarily and timely disclosed the majority of the misconduct described in the [Criminal] Information and Statement of Facts;

So the self-disclosure was one of the reasons that the DOJ entered into the DPA, however, and perhaps more importantly, the self-disclosure brought to Johnson & Johnson a monetary benefit with a tangible reduction in its overall fine and penalty. The DPA reported a reduction by 5 points of the company’s overall Culpability Score with the following:

(g)(1) The organization, prior to an imminent threat of disclosure or government investigation, within a reasonably prompt time after becoming aware of the offense, reported the offense, fully cooperated, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct; -5

It is not possible to determine from the DPA how much of the reduction was attributable to the self-disclosure and how much was attributed to the conduct thereafter. However, this precise language makes clear that the DOJ places a real value on such self-disclosures and companies should take this as a clear sign that, at the end of the day, it will be better for them to self-disclose.

II. Attachment D-Enhanced Compliance Obligations

The following nine points will not be unfamiliar to the FCPA compliance practitioner. These points are recognized to be in most ‘good to best’ compliance programs. However, the Johnson & Johnson DPA goes much further by adding an Attachment D, entitled “Enhanced Compliance Obligations” which is designed to be in addition to, and to build upon, the commitments made by Johnson & Johnson in Attachment C. These enhanced obligations include the following:

A. Compliance Department

B. Gifts, Hospitality and Travel

C. Complaints and Reports

- D. Risk Assessments and
- E. Acquisitions
- F. Relationships with Third Parties
- G. Training
- H. Annual Certifications

This Attachment D “Enhanced Compliance Obligations” is an excellent road map for the FCPA practitioner in which to establish, enhance, or simply review a company’s FCPA compliance program. As with the Attachment C, the DOJ expands upon each of these categories. The Johnson & Johnson DPA demonstrates that a company’s commitment to ongoing FCPA remediation and program enhancement will help it reduce its overall FCPA liability in a case with facts as bad as those presented in this matter.

These DPAs demonstrate that the DOJ is committed to releasing information on what it believes will constitute a *best practices* compliance program. It will be interesting to see if any of the witnesses before the House Judiciary Committee will acknowledge the DOJ’s efforts in this area or the recent federal court rulings on what may constitute an foreign governmental instrumentality under the FCPA in their testimony.

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