

## **Off to the Races in 2012: DOJ's Fast Start in FCPA Enforcement**

Tuesday, January 24, 2012



Talk about seeing the forest from the trees – during the same week that Judge Hughes granted the defense motion for judgment of acquittal in the O’Shea case, the Justice Department announced a \$56 million settlement in the Marubeni case, and Biomet disclosed it was planning on an FCPA settlement in the \$30 million range. Late last year, two major companies announced they were close to significant criminal settlements in major cases.

The number one trend/prediction for 2012 looks like it is coming to fruition – DOJ is back to collecting major criminal fines from corporations. It looks like the Justice Department is off to a fast start.

There will be more twists and turns in the coming months – expect a wiretap case and expect a huge criminal fine settlement in a high profile case. But DOJ’s criminal fines collections for FCPA violations will continue to ramp up, especially in comparison to 2011.

DOJ has been extremely successful in securing corporate fines for FCPA settlements. Its record in individual prosecutions is another story. Two defendants in separate cases have been cut loose by judges who were unimpressed by the government’s case. That is very poor reflection on prosecutorial discretion. It is critical that prosecutors pick and choose the “right” cases where they have strong evidence of guilt. Strong cases build credibility with judges; weak cases do not. DOJ needs to do a better job.

DOJ’s FCPA enforcement program is under the microscope. Congress is taking a hard look at legislation to reform the FCPA. The last thing DOJ needs right now is more judgments of acquittal in favor of defendants.

The first quarter is likely to be a very strong quarter for DOJ in collecting corporate settlements. 2012 could be a record year, far exceeding the \$16 billion in 2010. There are a number of investigations close to resolution, especially in the pharmaceutical and medical device industries.

DOJ has to be careful in its case selection for prosecuting individuals. Critics are likely to characterize DOJ’s FCPA enforcement program as similar to off-label marketing enforcement – large fines are collected against companies as a “cost of doing business” and individuals are rarely prosecuted and even more unlikely to be convicted when they are prosecuted.

If DOJ’s record in individual prosecutions continues to flounder, FCPA opponents will be able to argue more effectively that DOJ’s FCPA enforcement program is misguided. In this environment, FCPA reform advocates are likely to gain traction.

# Corruption, Crime and Compliance

[www.corruptioncrimecompliance.com](http://www.corruptioncrimecompliance.com)

PUBLISHED BY MICHAEL VOLKOV

[MVolkov@mayerbrown.com](mailto:MVolkov@mayerbrown.com)

DOJ needs to take bold action and out-manuever its critics. How? It has to offer some type of olive branch, some accommodation and meaningful guidance. It needs to clarify some of the uncertainties surrounding enforcement and address some of the more significant compliance issues – successor liability, compliance credit, and/or the “foreign official” definition. DOJ is caught in a political crosshair and needs to act – if they continue to ignore the forces that are lining up against the FCPA enforcement program, DOJ will pay a heavy price.