Corporate Social Responsibility and the FCPA

I was surprised to see the continuing the defense of the Foreign Corrupt Practices Act (FCPA) in publications normally thought of as pro-business. On July 1, authors Amol Mehra and Ajoke Agbool published an article in Forbes.com entitled, "*The Corporate Responsibility to Prevent Corruption*." This article followed two articles in the Wall Street Journal (WSJ) from the previous week which discussed the positive effects of the FCPA. In the Forbes.com article, the authors focused on a company's corporate social responsibility to refrain from engaging in bribery and corruption.

The authors began their piece on the recent Deferred Prosecution Agreement involving Johnson and Johnson (J&J). However, rather than concentrating on the specifics of the FCPA violative actions engaged in by J&J, the authors reviewed the J&J conduct in light of J&J's own stated Corporate Social Responsibility (CSR) Policy, which the authors quoted as:

We must provide competent management and their actions must be ethical. We are responsible to the communities in which we live and work and to the world community as well. We must be good citizens – support good works and charities and bear our fair share of taxes.

The authors noted that the actions of J&J which were found to violate the FCPA involved bribery in several countries in Eastern Europe. This corruption was disconnected from their stated company CSR Policy.

The authors went onto state that company compliance programs should not simply be seen as a means of reducing liability and risk; they are also critical components of a company's CSR Policy. The reality is that corruption should and does have its costs, and not just in situations where companies get caught. Bribery distorts competition and rewards those who cannot compete in an open and fair market. In his prepared statement before the recent House Judiciary Committee hearing on the FCPA, Department of Justice (DOJ) representative Greg Andres stated:

"*Corruption undermines the democratic process, distorts markets, and frustrates competition. When government officials, whether at home or abroad, trade contracts for bribes, communities, businesses and governments lose; and when corporations and their executives bribe foreign officials in order to obtain or retain business, they perpetuate a culture of corruption that we are working hard to change*."

The authors cited to the FCPA Legislative History for the statement, "*As Congress recognized, bribery ". . . rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business*." Returning to Greg Andres written testimony, he stated: *As the FCPA's legislative history makes clear, "Corporate bribery is bad business. In our free market system it is basic that the sale of products should take place on the basis of price, quality, and service*."

The authors also used examples of US businessmen who see value in the FCPA. After initially noting that if one bribe is given, it sets a negative precedent in which bribes may be expected in order for business to continue. The authors cited the example of Newmont Mining's Director of Corporate and External Affairs for Africa, who publicly stated:

Newmont's experience, particularly in Africa, has been that FCPA has been an enormously valuable protective device for us . . . when you have a government person saying . . . 'we'll give you that license if you buy us a car or something' . . . it's not about 'look I'm a mean guy and I don't have value our relationship, and therefore I'm not going to give it to you,' you say 'look, there's a law out there that means I'm going to go to jail if I do that, I'm not going to go to jail for you or anybody else.'

The above example and the one previously reported in the WSJ of Alcoa may be one of the reasons why some business leaders have come out in defense of laws like the FCPA that both incentivize companies to develop compliance programs and punish violators.

Mehra and Agbool argue that a strong internal compliance program should be an integrated part of corporate social responsibility. They believe that businesses should be able to identify and mitigate against bribes and corruption, not only to ensure compliance with the law but additionally to keep markets competitive and to ensure that their activities are benefiting the societies in which they operate. Lastly they note that, "*companies need to follow Newmont's lead and understand that regulations like the FCPA have the potential to be used as a shield, enabling access to areas where corruption is rampant by providing a defensive measure against those seeking bribes*."

The key takeaway from this article and the previous articles in the WSJ is that review of the FCPA must be something more than what we saw in the House Judiciary Committee hearing. Not only did the Representatives who put forward questions fail to cite any examples of the loss of US jobs by US companies because of the FCPA, they completely failed to discuss any of the positive aspects of the FCPA and would barely allow DOJ Representative Greg Andres to respond to any questions on this point. As Mr. Andres said, if companies do not engage in bribery and corruption they do not have anything to worry about with regard to the FCPA. It would appear that some of the country's more pro-business newspapers and journals are beginning to see the benefits of the FCPA.