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Amnesty Under the FCPA?: A Senate Spotlight Focuses Attention on Rising Concerns Regarding the FCPA's Explosive Growth

Strict enforcement of the Foreign Corrupt Practices Act ("FCPA") and the idea of offering some type of corporate amnesty program for businesses concerned about the remarkable increase in recent FCPA prosecutions and penalties was covered in a hearing earlier this week before a Senate Judiciary Subcommittee. Unfortunately for corporate America, the outlook for instituting such an amnesty program does not appear promising. Despite numerous calls for implementing such a program, and thereby incentivizing corporations to earnestly comply with the FCPA, the continuing rhetoric from the Department of Justice ("DOJ") has been negative.

"We don't believe that immunity is appropriate," testified Greg Andres, the Deputy Assistant Attorney General of the criminal division of the DOJ, "just as we don't believe that a bank robber could get immunity for disclosing that he robbed a bank."

The FCPA prohibits any and all bribes (whether financial or "anything of value") to foreign officials in exchange for favorable business dealings. The federal law applies to individuals and to U.S. companies, their employees and their agents. Over the last year alone, FCPA enforcement has grown astronomically as the Department of Justice imposed more than \$1 billion in criminal penalties for FCPA-related actions. Just five years ago, this number stood at a mere \$16 million. Charges against individuals have also increased dramatically as the DOJ restructured and added another dozen prosecutors to its newly focused FCPA unit.

On Tuesday, November 30, 2010, the Senate Committee on the Judiciary, Subcommittee on Crime and Drugs held a hearing to examine complaints that the FCPA is overly broad and in need of fundamental modifications in its interpretation and clarity. Chief among the suggestions is creating an amnesty program, such as the one DOJ already offers in antitrust matters, to encourage corporations to self-police their activities.

Several witnesses, including a number of former federal prosecutors, urged such a change, contending that a clearly defined amnesty program would alter the landscape, alleviate the growing level of anxiety in the business community, and incentivize effective compliance programs. The U.S. would not be acting alone in moving in this direction: The U.K., which recently enacted its own Anti-Bribery Act that will go into effect early next year, offers a comprehensive corporate compliance defense.

Another possible way forward is a six-step program offered by retired federal judge Stanley Sporkin that offers to "inoculate" corporations from FCPA exposure. These steps include a complete compliance review by an outside firm, full public disclosures and retaining a full-time FCPA officer to annually certify compliance.

For his part, outgoing Subcommittee Chairman Sen. Arlen Specter (D-PA) urged additional and harsher prison terms for corporate officers and directors. Concerned that the incredible criminal fines were only affecting corporate shareholders' pockets and not changing corporate behavior, Sen. Specter argued that "I am convinced that the only impact on matters of this sort is a jail sentence."

Clearly this is not the end of the debate. The Senate subcommittee hearing only appears to have sharpened the lines between the DOJ and the business community. More is sure to come, but in the meantime businesses should carefully examine their foreign business practices as well as the operations of their subsidiaries, employees and agents.

For more information involving this article or to ask specific questions regarding your own matter, please contact Venable and the authors of this article. Venable's SEC/White Collar Group, led by several former federal prosecutors, has significant FCPA experience. Venable is well-positioned to help companies preemptively avoid or, if necessary, prepare for and defend against such investigations.

