Proposed Amendments to the FCPA

In a White Paper released today by the US Chamber Institute for Legal Reform, entitled "*Restoring Balance-Proposed Amendments to the Foreign Corrupt Practices Act*", authors Andrew Wiessmann and Alixandra Smith argue that the time is ripe to amend the Foreign Corrupt Practices Act (FCPA) to make the statute more equitable and its requirements clearer. They propose five (5) amendments to the FCPA which they argue would serve to improve the Act. This post will discuss their White Paper and proposed amendments.

The authors begin their discussion by charting the increase in recent enforcement trends but note that judicial oversight and case interpretations of the FCPA are both still minimal. The authors argue that into this void the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) have aggressively engaged in an expansive reading of the FCPA in enforcing the Act. However, more importantly because of this dearth of case law interpretation "that the DOJ effectively serves as both prosecutor and judge in the FCPA context, because it both brings FCPA charges and effectively controls the disposition of the FCPA cases it initiates."

The authors note that businesses can spend millions of dollars for an FCPA investigation, even one which results in a no-prosecution result. They also opine that there "is also reason to believe that the FCPA has made US businesses less competitive than their foreign counterparts who do not have significant FCPA exposure" because the statute does not take into account the "realities which confront businesses that operate in countries with endemic corruption." Lastly the authors speculate that implementation of the UK Bribery, in April 2011, will lead "US enforcement authorities will apply even more pressure to companies through the FCPA so as not to be outdone in this area of traditional US dominance."

The authors provide five suggested reforms to the FCPA which they argue will promote "efficiency and enhancing public confidence in the integrity of the free market system as well as the underlying principles of our criminal justice system." They are:

I. Adding a Compliance Defense

Under this suggestion the authors believe that companies will increase their compliance with the FCPA because they will now have a greater incentive to do so. They envision a defense similar to the "adequate procedures" defense available under the UK Bribery Act. Companies will be protected if a rogue employee engages in corruption and bribery despite a company's diligence in pursuing a FCPA compliance program. 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."

II. Limiting Successor Liability

The authors believe that the current enforcement of FCPA liability on a successor corporation is "antithetical to the goals of criminal law" because it punishes a company which did not engage in a criminal act. The authors also believe that this legal concept has lead to a "chilling effect" on mergers and acquisitions. Therefore, if a company engages in sufficient due diligence, the DOJ should not be able to impute the criminal actions of others to it. Further the authors posit that the DOJ should create specific guidance as to what constitutes sufficient due diligence and make this guidance available to companies.

III. Adding a Willfulness Requirement

The authors consider that as the FCPA is currently interpreted, there is tantamount to strict liability for improper payments. Further that this interpretation is not fair to corporations. Not only do corporations not have specific knowledge that any bribery or corruption has been engaged in on the corporation's behalf but the corporation may unaware that its conduct, even if known, would have violated US law. The authors put forward that there must be some type of willfulness or knowledge of illegal acts but at the very least to the anti-bribery provisions. They end by asserting that the 'violative' conduct must be foreseeable under this proposed modification before the company can be charged under the FCPA.

IV. Limiting a Parent's Liability for the Acts of a Subsidiary

The authors point out that the SEC "routinely charges parent companies with civil violations of the anti-bribery provisions based on actions taken by foreign subsidiaries of which the parent is entirely ignorant." They believe that this is not a correct interpretation of the FCPA which requires that a corporation can only be held liable for the acts of a subsidiary where the parent authorized, directed or controlled the illegal conduct in question. While noting that this interpretation has not been tested in any US courts, the scope of this potential liability is of significant concern to US companies because of the possibility of profit disgorgement. For all of these factors, the authors conclude that "a parent's control of the corporate actions of a foreign subsidiary should not expose the company to liability under the anti-bribery provisions where it neither directed, authorized nor even knew about the improper payments in question."

V. Clarifying the Definition of Foreign Official

The authors conclude their five proposed amendments by suggesting that the definition of *who is a foreign official* be further defined. They note that while the statute does speak to "instrumentality thereof" a foreign official there is no further definition. Into this imprecise definition the DOJ has, once again, imposed an expansive reading, which has not been tested in court. This expansive reading has led US companies to have "no way of knowing whether the FCPA applies" to a transaction because there is allegedly no way to know if a foreign governmental official is involved. For these reasons, the authors

suggest that the definition of a foreign governmental official be more clearly defined to include such information as (1) "the percentage ownership by a foreign government that will qualify a corporation as an "instrumentality"; (2) whether ownership by a foreign official necessarily qualifies a company as an instrumentality and, if so, (3) whether the foreign official must be of a particular rank or the ownership must reach a certain percentage threshold; and (4) to what extent "control" by a foreign government or official will qualify a company as an "instrumentality."

The article is a good starting point for discussions on the FCPA. With the upcoming elections it will be interesting to see if any, or all, of these proposals gain traction. It may also lead to a revisiting of the issue of facilitation payments under the FCPA. After his speech to the Compliance Week Annual Conference last May, Assistant Attorney General for the Criminal Division of the US Department of Justice, Lanny Breuer, took several questions from the audience. One of his more interesting responses was regarding facilitation payments and whether the US was moving towards the OECD/UK Bribery Act model of not allowing such payments. He responded that it was a question which needed consideration as compliance standards are evolving on a world wide basis. However, Breuer was not aware of any proposed change in the FCPA on this issue but that it may be visited in the not too distant future. This issue could also be a part of the debate that authors Weissmann and Smith have furthered. In other words, be careful what you ask for, you just might get it.