The Real Risks of FCPA Criminal Prosecutions

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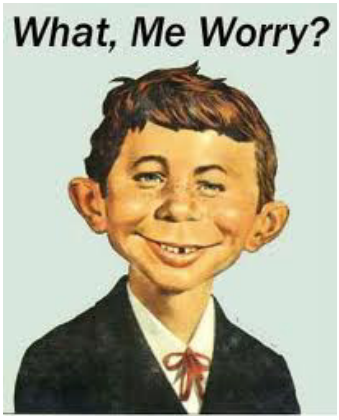

In the last few years, lawyers, accountants and other professionals have been beating the drum of aggressive enforcement of the FCPA (and the UK Bribery Act). There is no question that enforcement of anti-corruption laws around the globe has increased. The risk to companies and individuals has increased. But companies and individuals need to be realistic as to the real risks.

As everyone knows, the Justice Department "prosecutes" most of its cases through the voluntary disclosure process. Companies come in, confess their sins, agree to enhanced compliance (and possibly a monitor), and either plead guilty to a crime and pay a fine, and/or enter into a deferred or non-prosecution agreement. That is the standard model.

For those companies that have implemented compliance programs, or are in the process of doing so, a criminal case based on historical evidence is unlikely to be launched unless prosecutors obtain credible information from other parties, public sources or a whistleblower of potential violations. In the absence of such information, the risk of criminal prosecution for good faith attempts to comply based pursuant to a compliance program is unlikely to lead to a criminal prosecution so long as a company's actions are documented and affirmative steps are taken to comply with the law and a compliance program.

Companies run a more significant risk if they fall within DOJ and FBI attempts to conduct a "proactive" investigation, meaning investigative tactics reserved for drug trafficking or criminal organizations, such as using informants, undercover officers and even wiretaps.

In the next few years, DOJ will definitely conduct more proactive investigations in the corruption area. How do we know that? DOJ is actively building an intelligence base of cooperating witnesses and informants who are debriefed on industry information and employed to conduct undercover tactics. They will use these cooperating informants/defendants to record telephone calls, meetings and other contacts needed to build bigger cases against individuals and companies.

How do we know this? Defense counsel who practice in this area know that cooperating individuals in white collar cases are routinely asked about information of corruption. Cooperating individuals have existing relationships with other individuals in the industry which can be exploited for undercover operations.

In recent settlements, companies in the pharmaceutical and medical device industries have been cooperating with DOJ and the SEC. At the same time, DOJ has launched "industry-wide" inquiries. It does not take a rocket scientist to figure out who was providing DOJ with valuable intelligence needed to investigate other companies for corruption violations. Such information may be historical or cooperating individuals may be engaged in undercover operations. As I tell many of my clients,

imagine that every business conversation you have is recorded – how would that impact your compliance program?

Companies need to monitor industry trends and re-evaluate risks based on potential federal investigations and prosecutions. Antitrust criminal investigations usually bleed into, or vice versa, corruption investigations. Moreover, international cooperation has increased significantly leading to sharing of information and launching of new investigations based on activities in other countries (e.g. Alstom investigation).

Historical evidence can be gathered and there is always a risk of proactive, undercover tactics. It is a new, risky world, and companies have to assess and monitor those risks.
