FCPA Enforcement: Why Corporations Support DPAs and NPAs

At the recent Dow Jones Global Compliance Symposium, there was a debate royal between Mark Mendelsohn and the FCPA Professor, Mike Koehler, regarding enforcement of the Foreign Corrupt Practices Act (FCPA). One of the points the Professor raised was regarding the proliferation of Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs) during the tenure of Mendelsohn at the Department of Justice (DOJ). The Professor argued that DPAs and NPAs, which did not come into wide spread use until the last decade, were tools which should not be employed for FCPA enforcement. One of the reasons he articulated this was that by use of these agreements the DOJ is not required to put proof in front of a judge or jury, hence the DOJ can expand its interpretation of the FCPA without appropriate judicial oversight. Mendelsohn countered that such agreements are within prosecutorial discretion and given a finite amount of personnel and monetary resources within the DOJ, an appropriate mechanism to assist the overall goal of compliance with the FCPA.

However, I would like to review the use of DPAs and NPAs from another angle and the perspective from another player in FCPA enforcement. That is the perspective of the corporation ensnared in an enforcement action. I will leave aside a discussion of the alleged expansive DOJ interpretation of the FCPA for another day and simply focus on why it is in the interest of a corporate defendant to enter into a DPA or NPA as opposed to being indicted and defending itself at trial.

Arthur Andersen

For those of you who do not recall, Arthur Andersen was the auditor for Enron and was caught up in the Enron scandal. In 2002, the firm voluntarily surrendered its licenses to practice as Certified Public Accountants (CPAs) in the United States after being found guilty of criminal charges relating to the firm's handling of the auditing of Enron. The other national accounting and consulting firms bought most of the practices of Arthur Andersen. The verdict was subsequently overturned by the US Supreme Court. However, the damage to its reputation has prevented it from returning as a viable business. In other words, after fighting the criminal charges brought against it and losing at trial, Arthur Andersen imploded.

No US Company wants to face this prospect. By being indicted they will probably find their access to credit greatly reduced and their ability to move forward as an ongoing concern compromised. Juries still do not have a high opinion of corporations and what may appear to be ‘sharp but legal’ business practices may look like bribery and corruption to a jury. The DOJ’s recent set-backs on the individuals it has indicted and/or taken to trial should not affect a jury’s perception of corporate corruption. No publicly traded company can take the risk. For private companies, the resulting violations of loan covenants and other denials to capital would probably have the same effect.

Certainty

In my legal career if I have learned one thing about representing corporations it is that they do not like surprises and one of the things they most desire is certainty. The one thing I learned in almost 20 years of trying cases (civil side only) is that nothing is certain when you leave the final decision to an ultimate trier of fact who is not yourself, whether that trier of fact be a jury, judge or arbitrator. The most important thing for a company is certainty and that is even more paramount when a potential criminal conviction looms over its corporate head. A DPA or NPA provides this certainty. Corporations not only know what their financial penalty is but they also know their ongoing obligations, in the form of the compliance program they should implement or enhance and ongoing reporting requirements.

Expansive Effect

Just as it benefits the DOJ to drive corporate behavior to comply with the FCPA, through its enforcement of the FCPA; it benefits corporations to understand what is expected from them. Both goals are achieved by the use of DPAs and NPAs. This is because one of the other benefits to DPAs and NPAs is that it provides information and guidance to other companies and compliance practitioners as to the DOJ's thinking regarding a *best practices* compliance program. Any improvements or new aspects to a minimum *best practices* compliance program, which are announced in a DPA or NPA, will inform other companies and will expansively compound the effect from a DPA or NPA. The size of the company involved in the enforcement action does not matter as all DPAs and NPAs are publicly announced.

So as the "Enhanced Compliance Obligations" in the Johnson & Johnson (J&J) DPA gave companies additional guidance on how to deal with acquisitions; the recent Biomet DPA provided specific information to Internal Audit on its role in a minimum *best practices* compliance program. A review of any recent DPA or NPA also shows the clear benefits of self-disclosure and cooperation, which can lead to a significant reduction in the overall monetary penalty.

From my perspective, as someone who has represented corporations, as both an outside counsel in private practice and in-house counsel, I believe that DPAs and NPAs not only further the goals of the FCPA but bring tangible benefits to corporations. I do not believe that they should be removed from the DOJ's arsenal for enforcement.