

Client Alert.

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DOJ Official Proclaims “New Era” of FCPA Enforcement

By Paul T. Friedman, Ruti Smithline, and Angela E. Kleine

Assistant Attorney General Lanny Breuer, Criminal Division, Department of Justice, announced a “new era of FCPA enforcement” this week.¹ He emphasized that DOJ’s aggressive enforcement of the FCPA is “here to stay.”

The Foreign Corrupt Practices Act (“FCPA”) is a federal law enacted in 1977 to prohibit making payments to foreign officials for the purpose of obtaining or retaining business.² It applies broadly to U.S. companies and individuals, companies that have issued securities registered in the U.S., employees and agents of U.S. businesses, and foreign nationals and businesses that cause prohibited acts in the U.S.

Speaking at the American Conference Institute’s National Conference on the Foreign Corrupt Practices Act, Mr. Breuer described “historic” growth in FCPA actions during 2010. He concluded with concrete advice to companies operating in the new climate of “vigorous” enforcement.

AGGRESSIVE ENFORCEMENT

FCPA enforcement has “become more aggressive,” and Mr. Breuer stated that companies “are right to be more concerned.” He detailed the Department of Justice’s FCPA increased enforcement efforts during 2010, including:

- **“Historic Cases”:** In the past year, DOJ has imposed well over \$1 billion in criminal penalties—more than in any prior 12-month period. Last year and this year combined, the government has charged over 50 individuals and collected nearly \$2 billion in FCPA-related cases. In comparison, in 2004 it charged just 2 individuals and collected \$11 million. The Department is now focused on prosecuting individuals, as well as levying substantial criminal fines against companies.
- **“Significant Changes in the Fraud Section”:** The Department’s Fraud Section grew significantly this year. Its new FCPA Unit alone consists of over a dozen prosecutors dedicated solely to FCPA cases. The FCPA Unit is also working with the Asset Forfeiture and Money Laundering Section, which targets, in part, proceeds of foreign official corruption being laundered through the United States.
- **Increasing International Cooperation:** The Department is expanding its reach by forming partnerships with foreign agencies. Cooperation with the U.K.’s Serious Fraud Office, for example, led to guilty pleas and a \$400 million-plus criminal fine against a U.K. company. The speech also highlighted the United States’ participation in the Organization for Economic Cooperation and Development (“OECD”), an international economic organization of 30 member countries.

¹ A transcript of the speech is available at <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html>.

² Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78dd-3, 78ff). For a summary of the FCPA’s provisions, please see our Client Alert from September 20, 2010, available at <http://www.mofo.com/files/Uploads/Images/100920-FCPA.pdf>.

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TAKING ON FCPA CRITICS

Mr. Breuer acknowledged that the government's increasingly aggressive FCPA enforcement has drawn criticism. He agreed that there has been some "thoughtful" commentary, but emphasized that some "much less thoughtful commentary" is "exactly upside down."

- **Rejecting "Bad for Business" Criticisms:** Mr. Breuer forcefully rejected the argument that FCPA enforcement is "bad for business." He reiterated the Department's position that the FCPA is vital to ensuring market integrity and an even playing field.
- **"Competitive Disadvantages":** Mr. Breuer described the criticism that FCPA enforcement puts American business at a competitive disadvantage as "unfounded." More than half of the Department's FCPA resolutions in the last five years have involved foreign companies. In any case, the United States, he said, leads by example. As a result, the U.K. and other OECD members are stepping up anti-bribery enforcement around the world.
- **Open to Suggestions:** Mr. Breuer acknowledged that at least some criticisms are "worth debating." The Department takes "serious commentary" into account. He specifically recognized calls for an amnesty program similar to that under antitrust law. He did not entirely reject it, but said only, "I can at least tell you that we listened to [and] considered suggestions of this kind."

SUGGESTIONS TO COMPANIES

Mr. Breuer made clear that companies should not "wait in worry for [DOJ] to come knocking." Rather, companies need to be proactive and take affirmative steps that "would put [] organizations in a better position for the day we do come knocking, or that could prevent us from coming at all." He offered two specific suggestions to companies given the climate of vigorous FCPA enforcement.

1) "Take a hard look at your organization's FCPA compliances practices."

Reviewing and strengthening compliance programs is more important than ever in the Department's "new era" of FCPA enforcement.

- **Guidance from the OECD:** Mr. Breuer referred companies to the OECD's recently published *Good Practice Guidance on Internal Controls, Ethics, and Compliance*.³ The OECD's recommendations for evaluating compliance programs include:
 - **Risk-Assessment:** Assess the company's individual risks, such as industry and geography, to tailor internal controls, ethics, and compliance programs.
 - **A Strong Anti-Corruption Policy Based on the Risk Assessment:** Implement a clear and visible anti-corruption policy applicable to all employees and entities the company controls. High-risk areas, such as gifts and hospitality expenses, should be the subject of specific compliance programs. Senior management should establish a strong "tone at the top," and individuals at all levels of the company should be responsible for monitoring and ensuring compliance.
 - **Oversight:** Consider whether a senior corporate officer should be charged with overseeing anti-bribery compliance. That individual (or group) should have sufficient resources, autonomy from management, and the authority to report directly to the board's audit committee.

³ The guidance is available on the OECD website at <http://www.oecd.org/dataoecd/5/51/44884389.pdf>.

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- **Guidance:** Make guidance and advice, including responses to urgent questions about situations in foreign jurisdictions, available to employees and business partners.
- **Reporting:** Allow all employees and business partners to report potential violations confidentially and protect them from discipline.
- **Re-Assessment:** Regularly review and re-assess anti-bribery policies and programs.
- **High-risk industries:** Mr. Breuer discussed the fact that the government is increasingly taking an “industry-wide approach” to FCPA investigation. Corporations can even receive “credit” by providing the government with information about their competitors and clients. Industries that have been the subject of a high number of Department of Justice and Securities and Exchange Commission enforcement actions include energy, infrastructure, pharmaceuticals and medical devices, life sciences,⁴ telecommunications, and defense.

2) Self-Reporting

Mr. Breuer assured companies, “there is no doubt that a company that comes forward on its own will see a more favorable resolution than one that doesn’t.” He cited a recent example in which “cooperation” meant that company counsel conducted an investigation in 46 jurisdictions, hired an outside auditor, and held over 60 meetings and calls with the DOJ and SEC. The company ultimately received a deferred prosecution agreement.

Mr. Breuer’s message encouraging self-reporting is not itself reflective of a “new era” of enforcement. The Department, as reflected in Mr. Breuer’s speech, has traditionally encouraged companies to self-report violations. But, the decision whether to self-report is, as Mr. Breuer acknowledged, “a difficult one.” The analysis needs to take into consideration more than the cooperation credits available. The decision is necessarily informed by the specific facts and circumstances, and should be made only after consideration of all relevant factors, in consultation with expert counsel.

CONCLUSION

Mr. Breuer’s speech underscores the increasing momentum of FCPA enforcement activities, and the high priority DOJ is giving to FCPA enforcement. His suggestion that companies take a hard look at their FCPA compliance policies and controls is a good one, and we have been speaking to our clients about the importance of doing so.

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⁴ For more information, please see our Client Alert from January 19, 2010, “Government FCPA Enforcement ‘Intensely Focused’ on Life Sciences Companies,” available at <http://www.mofo.com/government-fcpa-enforcement-intensely-focused-on-life-sciences-companies-12-01-2009/>.

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