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The FCPA in 2011: Five Answers and a Looming Question

February 1, 2012 by Thaddeus McBride and Mark Jensen

The Department of Justice has been warning the Life Sciences industries - pharmaceutical and medical device companies - of its intent to focus "on the application of the Foreign Corrupt Practices Act" ("FCPA") on the pharmaceutical and related industries. (Lanny Breuer, Assistant U.S. Attorney for the Criminal Division, November 12, 2009). The FCPA prohibits, among other things, the actual or attempted bribery of foreign government officials in order to assist in obtaining or retaining business. Potentially violative payments include cash, gifts, charitable donations, travel, meals, entertainment, grants, speaking fees, honoraria, and consultant arrangements. The FCPA does not contain a materiality threshold as to the size of the payment to the government official or the amount of business obtained. While there are some safe harbors for payments to foreign officials, these exceptions are narrowly construed and apply only rarely. There are many situations where these issues can arise for Life Sciences companies in foreign countries.

Because of this focus, Life Sciences companies need to be aware of how the DOJ is enforcing the FCPA. The following blog article, from our Global Trade Law blog, should be reviewed with this in mind.

There were several noteworthy developments related to the Foreign Corrupt Practices Act (FCPA) in 2011. For the first year in recent memory, however, the most significant developments were not simply huge monetary settlements (although there were those, too). Instead, the key developments of 2011 provide new guidance on how the U.S. Department of Justice (DOJ) and – notably – the courts view enforcement under the statute. While we have a more nuanced view of the FCPA after 2011, we are also left with a substantial question about the future of the law.

Background. 2011 began with the U.S. government seemingly marching on toward continued significant FCPA prosecutions. The dramatic group settlement in November 2010 by Panalpina and several of its customers for alleged bribes paid in Nigeria and elsewhere forcefully capped 2010, and underscored the ability of the DOJ and the U.S. Securities and Exchange Commission (SEC) to investigate and settle cases against a cross-section of industry. April 2011

provided another example of cross-industry reach, when JGC Corporation paid a $218.8 million criminal penalty to the DOJ to settle charges related to alleged bribes to obtain contracts to build liquefied natural gas facilities on Bonny Island, Nigeria. JGC Corp. was the fourth company to enter into a settlement related to the Bonny Island venture yet paid the smallest penalty of the four.

In January 2012, however, the future of the FCPA appears quite different. It is true that, according to public information, the U.S. government continues to prosecute dozens of FCPA cases against individuals and companies. In addition, the government won important victories in 2011. On the other hand, certain aspects of FCPA enforcement were brought into question over the course of the year. The DOJ has suffered significant losses at trial that may point to deeper shortcomings in the way cases are investigated and prosecuted. Most of all, potential Congressional involvement in the FCPA could significantly affect the law and how it is enforced.

Five Answers. Five notable developments from 2011 may shape the future course of the FCPA and enforcement under the statute.

1. Broad interpretation of "foreign official" upheld. The FCPA prohibits bribery of a "foreign official," defined as "any officer or employee of a foreign government or any department, agency or instrumentality thereof," 15 U.S.C. 78dd-2(h)(2)(A), for the purpose of obtaining or retaining business, 15 U.S.C. 78dd-2(a)(1). In *U.S. v. Aguilar*, No. 10-01031 (C.D. Cal. Apr. 20, 2011) (order denying motion to dismiss), the U.S. District Court for the Central District of California issued a ruling that concluded that officials of Mexico's state-owned utility company, Comisión Federal de Electricidad, could qualify as foreign officials under the FCPA because the company was created by statute; its governing board was made up of high-ranking government officials; it described itself as a government agency; and it performed a quintessential government function. Perhaps equally important, the court listed several factors it evaluated in making its determination, including whether the enterprise provides a service to the citizens of the jurisdiction; whether the key officers and directors of the entity are appointed by government officials; whether the entity is financed through government appropriations or revenues obtained as a result of government-mandated taxes, fees, or royalties; whether the entity is vested with and exercises exclusive or controlling power to administer its designated functions; and whether the entity is widely perceived to be performing governmental functions.

2. The DOJ will both win and lose FCPA cases at trial. The DOJ victory in *Aguilar* on the legal scope of "foreign official," under which state-run corporations may be considered "instrumentalities," turned out to be somewhat short-lived, as the presiding judge ultimately overturned a jury conviction on grounds of prosecutorial misconduct. In particular, the court held that the prosecutors engaged in "many" and "varied" mistakes that, in sum, "added up to an unusual and extreme picture of a prosecution gone badly awry." *Aguilar*, No. 10-01031, at 5. The

defeat was particularly stinging because it came on the heels of the first jury conviction of a corporation (Lindsey Manufacturing Co., for which Aguilar was a sales agent) under the FCPA, for alleged bribes made through Aguilar's company.

The first trial resulting from the "ShotShow" series of cases also ended badly for the DOJ,[1] when a mistrial was declared after the jury failed to reach a verdict after six days of deliberation. The defense stressed that the government went to great lengths during the sting operation to make the proposed transaction appear legal by, for example, never using the words "bribe" or "kickback" and assuring the defendants that the proposed transaction had been vetted by the U.S. State Department.

In other individual cases, the government has had more success. For example, in *U.S. v. Esquenazi*, No. 09-21010 (S.D. Fla. Oct. 26, 2011) (judgment), the former president of Terra Telecommunications Corporation was sentenced to 15 years in prison for committing and conspiring to commit both money laundering and FCPA violations by making payments to directors of Haiti's state-owned national telecommunications company. According to the DOJ, this is the longest prison sentence yet imposed in a case involving the FCPA. In March 2011, a U.K. national pleaded guilty to violating the FCPA and agreed to forfeit nearly $149 million for channeling bribes to Nigerian government officials again in connection with the Bonny Island venture.

3. The DOJ closely scrutinizes compliance programs. While this is not exactly news, 2011 provided still more evidence that DOJ expects companies to maintain sophisticated compliance programs. As we covered last July, as companies dedicate more attention to compliance, the DOJ may be decreasing its use of compliance monitors in favor of detailed compliance obligations.

Another reminder of the importance of fully implemented compliance programs came in January 2011, when Maxwell Technologies Inc. paid $14 million to settle charges that its Swiss subsidiary paid $2.5 million in kickbacks through an agent to a Chinese state-owned utility company. The SEC criticized the company's internal controls as "wholly inadequate," noting that its code of conduct included only a brief FCPA section; the company failed to conduct due diligence on the agent responsible for the payments; and the company failed to provide anti-corruption training to those involved in the payments.

4. The SEC introduces deferred prosecution agreements. In May 2011, Tenaris S.A. paid $8.9 million to settle charges that it paid officials of an Uzbekistan state-controlled oil company for competitors' bid information. The SEC stated that the company's immediate self-reporting, full cooperation with the government, and enhancements to its compliance program made it an appropriate candidate for the SEC's first deferred prosecution agreement.

Besides the financial benefit of a deferred fine, it remains to be seen exactly what the utility of a DPA is in the SEC context. In a typical SEC settlement in which a company neither admits nor denies allegations, the company may avoid an injunction.[2] In contrast, in the DOJ context, avoiding potential criminal liability can be of particular value.

5. Foreign anti-bribery prosecution continues to expand. Outside the United States, Canada brought its first major case under its anti-bribery statute, resulting in a penalty of approximately CAN $9.5 million to settle allegations that an oil and gas company paid bribes to an energy ministry official in Bangladesh. South Korea also brought its first case under its anti-corruption statute, as two representatives from a Korean logistics company and a travel agency were indicted for alleged bribes paid to the executive of a Chinese airline.

In addition, more countries are implementing anti-bribery legislation. Perhaps most significantly, the U.K. Bribery Act entered into force in July 2011, imposing a somewhat broader scope than the FCPA by, among other measures, outlawing commercial bribery, the receipt of bribes, and facilitating payments. The U.K. Act also includes a safe harbor provision for companies that maintain an effective compliance program; this provision may create significantly more protection and certainty for compliant companies than is provided for under the FCPA. China also has implemented its own anti-bribery act.

The Question. For all of the guidance arising from these developments, the specter of Congressional involvement cloaks the future of the FCPA. The U.S. Chamber of Commerce is making a concerted push to amend the law, arguing that it is having a chilling effect on U.S. business abroad. Democratic U.S. Senators from Delaware and Minnesota have indicated that they plan to propose legislation to clarify parts of the law. The Senators argue that the high penalties under the statute mean that companies at least should know clearly what the rules are.

The Chamber proposes, among other changes, a “safe harbor” provision that would allow companies to avoid liability if they have sufficient internal controls in place to prevent bribes. Such a measure would seem to track the “safe harbor” provision of the U.K. Bribery Act. At least according to the Chamber, there is growing sentiment that U.S. business has been damaged by trying to comply with the FCPA yet still do business in areas of the world where corruption is widespread.

The likely results of Congressional involvement, even if greater clarity is obtained, are less clear. For example, in December 2011, a proposed bill was reintroduced in the U.S. House of Representatives that would automatically debar federal contractors who are convicted of violating the FCPA. This sort of extension of penalties for violations is probably not what the Chamber and other advocates for reform had in mind.

In response to criticism and political action by the Chamber, the DOJ has argued that such changes could weaken the FCPA just when its influence – especially on other countries and their enforcement tactics – is at its zenith. The DOJ has agreed that there could be greater transparency under the FCPA, and thus has indicated that it plans to release "detailed new guidance" on the law sometime in 2012. We suspect that such guidance may expand upon more specific guidelines DOJ has provided in enforcement action settlement documents in the past year, most notably in the Johnson & Johnson settlement.

Conclusion. As more actors become more involved in how the FCPA is interpreted and enforced, the law will hopefully become clearer. Specific compliance obligations will hopefully be introduced so that some sort of safe harbor provision can be created, as it has under the U.K. Bribery Act. It is unclear, however, how we will arrive at changes to the FCPA, if any, in the coming year. Increasing international enforcement further complicates the picture. As changes occur, companies will need to be nimble to take advantage of, and comply with, shifts in laws and enforcement.

[1] On Jan. 19, 2010, the FBI conducted a now-infamous raid on a trade show in Las Vegas, arresting 21 individuals. The raid followed an undercover sting operation in which FBI agents posed as officials from an African country and solicited bribes from the defendants in exchange for lucrative defense contracts. This was the first time the government had used an undercover sting to enforce the FCPA.

[2] This SEC practice is in question after a federal judge in New York recently indicated it did not provide a sufficient evidentiary basis for the court to know whether requested relief was justified. In addition, the U.S. House of Representatives Financial Services Committee has announced it will hold a hearing this year to examine the practice.

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