

## **DOJ and SEC Affirm Continued Commitment to Rigorous FCPA Enforcement**

**November 14, 2011**

At the 26th annual National Conference on the Foreign Corrupt Practices Act (FCPA), held November 8 and 9, 2011, officials from the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) stressed that both agencies are committed to FCPA enforcement and will continue their aggressive pursuit of companies that violate the FCPA.

### **DOJ Makes FCPA Enforcement a Top Priority**

Associate Attorney General Lanny Breuer declared that the DOJ has “no intention whatsoever of supporting reforms whose aim is to weaken the FCPA and make it a less effective tool for fighting foreign bribery.” Breuer’s statement was in response to efforts by the U.S. Chamber of Commerce’s Institute for Legal Reform to push for amendments to the FCPA that would provide a compliance program defense against FCPA charges, limit successor liability, impose a “willfulness” requirement for corporate criminal liability, and limit a parent corporation’s civil liability for acts by a foreign subsidiary. The U.S. Chamber of Commerce retained former Attorney General Michael Mukasey in early 2011 to assist with its efforts to reform the foreign bribery law, and there is speculation that a new bill will be introduced soon. Breuer asserted that, given the turning tide against corruption in many parts of the world, as measured by the number of nations that have passed antibribery legislation as well as by the recent popular uprisings in the Middle East that were fueled in part by public outrage over corruption, “this is precisely the wrong moment in history to weaken the FCPA.”

Throughout 2011, FCPA enforcement has continued to be one of the DOJ’s top priorities. As of September 2011, there were an estimated 33 resolved FCPA enforcement actions for the year. While the number of FCPA matters resolved in 2011 will almost certainly exceed the number resolved each year in the period from 2007 to 2009, it is slightly behind 2010’s record pace of 74 resolved FCPA enforcement actions. One reason for the decline in resolved enforcement actions may be the increase in FCPA trials. Breuer stated in a speech that the DOJ is currently in the midst of its fourth FCPA trial of the year, an amount “more than in any prior year in the history of the [FCPA].”

Breuer also highlighted new FCPA enforcement initiatives, announcing that the DOJ soon will be releasing a “detailed new guidance on the FCPA’s criminal and civil enforcement provisions.” Although the extent of the guidance is unclear, it is possible the guidance may offer companies and individuals more predictability regarding how their case may be treated by the DOJ in the event of a transgression.

Breuer also touted the new Kleptocracy Asset Recovery Initiative, which utilizes civil forfeiture laws to identify and recover the proceeds of foreign official corruption. In October 2011, the DOJ filed two civil forfeiture complaints seeking a combined total of more than \$140 million in assets—its most significant efforts to date.

### **Use of DPAs and NPAs in Resolving FCPA Actions**

The SEC also appears to be intensifying its FCPA enforcement efforts. During one panel discussion, Kara Brockmeyer, Chief of the SEC's FCPA Enforcement Unit, announced several new FCPA enforcement initiatives, including enhanced cooperation with the SEC's international counterparts, a greater focus on individual and agent liability, and increased scrutiny of company compliance programs. Brockmeyer noted that, in May 2011, the SEC entered into its first-ever deferred prosecution agreement (DPA) against Tenaris S.A., a supplier of tubes and related services for the energy industry, to resolve an FCPA enforcement action. Tenaris entered into a nonprosecution agreement (NPA) with the DOJ in the same matter.

Denis McInerney, Chief of DOJ's Fraud Section, and William Stuckwisch, Assistant Chief of the DOJ's Fraud Section, indicated in panel discussions that DPAs and NPAs will continue to be important tools for the DOJ in resolving FCPA actions. Whereas 24% of FCPA enforcement actions were resolved by DPAs or NPAs in 2009, more than 40% of FCPA enforcement actions were resolved by such agreements in 2010 and in the first half of 2011. McInerney and Stuckwisch affirmed that the DOJ's Fraud Section considers the following factors, as outlined in the Principles of Federal Prosecution of Business Organizations, when evaluating whether to resolve corporate enforcement actions through DPAs or NPAs: (1) the nature and seriousness of the violation, (2) the pervasiveness of the violation, (3) whether the company is a repeat offender, (4) whether the company voluntarily disclosed the violation, (5) the extent of the company's cooperation, (6) the nature of the company's compliance program at the time of the violation, (7) the company's remedial actions, and (8) the collateral consequences of the proposed resolution. Stuckwisch emphasized that the importance of voluntary disclosure is borne out by the statistics: in the last two years, every single NPA resulted from a voluntary disclosure. Moreover, in 2010, less than one-third of voluntary disclosures resulted in guilty pleas, and all guilty pleas were at a subsidiary—rather than parent—level.

### **Implications**

Despite continued criticism of the government's increased FCPA enforcement, and in the face of lobbying efforts to diminish the force of the FCPA, DOJ and SEC officials continue to send a strong message that the agencies will continue to aggressively pursue companies that violate the FCPA. Companies should seek guidance in implementing compliance and internal controls to effectively guard against such violations.

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