As many compliance practitioners are aware, the FCPA Professor (in real life, Ironman Triathlete Mike Koehler) writes a daily blog on all things relating to the Foreign Corrupt Practice Act (FCPA) from the legal perspective. It is a great resource and one that you should put on your daily reading list. However, as a professor he also writes lengthier, law review articles, with his in-depth analysis and commentary. This month we are treated to an excellent law review article entitled “Big, Bold and Bizarre: The Foreign Corrupt Practices Act Enters a New Era”. Coming in at a hefty 50 pages, it is his analysis and commentary of “using 2010 FPCA enforcement actions, related developments and how big FCPA enforcement has become.” It is an excellent and most welcomed resource for the compliance practitioner who needs a solid review of where the FCPA enforcement year has been and what it may portend for the future.

The Professor divides his article into four parts. In Part I, he reviews the specifics of FCPA enforcement in 2010, what he terms the “big, bold and bizarre.” In Part II, he reviews the increased scrutiny of the FCPA, by courts who faced increased legal challenges due to increased individual prosecutions, Congressional scrutiny and business and legal commentary. In Part III, he reviews some legal developments related to the FCPA, such as Dodd-Frank and debarment legislation. In Part IV, he takes a look at the FCPA road ahead.

**Big, Bold and Bizarre**

A. **Big.** The Professor lists some of the raw numbers generated through FCPA enforcement actions. The Department of Justice (DOJ) and Securities and Exchange Commission (SEC) garnered almost $1.8 billion in fines, penalties and profit disgorgement through FCPA enforcement actions.

B. **Bold.** Here the Professor recounts that the DOJ “continued to push the envelope as to enforcement theories in two specific areas.” The first is regarding the definition of who is a ‘foreign official’ under the FCPA and the second revolves around the interpretation of “obtain or retain business” and facilitation payments under the FCPA.

C. **Bizarre.** Here the Professor looks at both general fact patterns and some specific enforcement actions. Generally, he notes that in the majority of DOJ enforcement actions, the eventual DOJ fine or penalty was at an “amount below the minimum range suggested by the [US] Sentencing Guidelines.” He also discussed some of the specific matters he believed had “bizarre patterns” such as Innospec, BAE, Digi International and the Giffen prosecution.

**Increased Scrutiny**

While noting that the increased scrutiny actually began in Q3, 2009 with the release of the Chamber of Commerce Whitepaper and Senate Judiciary Committee hearing, 2010 brought a more thorough debate in both Congress and the private sector. This included the House Judiciary Committee hearing in June as to whether the FCPA should be made less robust to facilitate job
creation, judicial scrutiny in the form of some high profile individual prosecutions, where federal
district courts had to directly confront challenges to the FCPA on what are ‘instrumentalities’
under the Act and who is a foreign governmental official. In the private sector, the Chamber of
Commerce kept up its attack on the FCPA as anti-competitive and there was also bar and NGO
commentary on the FCPA.

**FCPA Related Developments**

Obviously the passage of Dodd-Frank had a very large impact on the 2010 FCPA discussion.
The Professor noted that “Many predict that Dodd-Frank’s whistleblower provisions will greatly
increase the number of FCPA enforcement actions.” In addition to his Dodd-Frank discussion, he
reports on the passage of the ‘Overseas Contractor Reform Act’ by the House, which would have
debarred any company from doing business with the US government if it sustained a final
judgment of a FCPA violation. However, the legislation was not passed by the Senate so it died
in the last session.

**The Road Ahead**

The Professor concludes his article by noting that “the years ahead will likely see more of the
same big, bold and bizarre developments as 2010.” One development he believes should
continue is the increase in the scrutiny of the FCPA, both by Congress and continuing review
and commentary by others, such as the Professor (and I). While noting that some have viewed
discussion about FCPA reform as akin to “paving the way for business to go on a bribery binge”;
the Professor clearly believes in the value of continued discussion and debate on how to achieve
the goals of the FCPA is appropriate and necessary.

The article is well worth your time to read and see where we have been and where we might be
going. If you needed one article to give you the information to provide to management on FCPA
enforcement, trends and commentary from last year; this is it. While you may, or may not,
disagree with the Professor’s conclusions, you cannot have a better resource from which to
review the facts.

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