House Judiciary Committee FCPA Hearing: An Opportunity for Greater Information

In a recent post on the FCPA Blog, attorney Michael Volkov reported that the US House Judiciary Committee was planning an oversight hearing on the Justice Department's enforcement of the Foreign Corrupt Practices Act (FCPA). House Judiciary Committee Staff Member, Sam Ramer identified three areas of concern that the Committee would be "looking at", (1) complaints that the FCPA should be amended to include an "adequate procedures" defense to corporate liability; (2) that the definition of "foreign official" should be amended to provide greater clarity; and (3) that successor liability should be modified to limit the liability of companies for acquisition of companies which have engaged in past FCPA violations. In this post I will discuss '*adequate procedures*' or in American legalese, an affirmative defense.

I. The Senate Hearing

In a hearing on November 30, 2010, entitled the "Examining Enforcement of the Foreign Corrupt Practices Act", in what the FCPA Blog termed "an unprecedented investigation into the Department of Justice's (DOJ) enforcement of the Foreign Corrupt Practices Act (FCPA)", the US Senate Judiciary Committee, Subcommittee on Crime and Drugs and three panelists, Butler University Professor and author of the FCPA Professor blog, Michael Koehler, attorneys Andrew Wiessmann, of the firm of Jenner and Block, and Michael Volkov, of the firm Mayer Brown, presented proposed changes to the FCPA. The witnesses all believe that the changes required are (1) to bring FCPA enforcement into line with Congressional intent; (2) to bring a more balanced approach in providing incentives to companies to comply with the law; and (3) to bring greater certainty and fairness to statutory interpretation and enforcement.

An Affirmative Defense

Attorney Andrew Wiessmann testified about 2 of his 5 proposed amendments to the FCPA (the full five proposed amendments are set out in Whitepaper entitled "*Restoring Balance-Proposed Amendments to the Foreign Corrupt Practices Act*"). These two proposals were to create a compliance defense available to a company if it has an adequate compliance program, similar to the "adequate procedures" defense available under the UK Bribery Act. If such a defense was created it would constitute a statutory affirmative defense that a company could raise in response to a DOJ prosecution.

Under this proposal, Wiessmann testified that companies will increase their compliance with the FCPA because they will now have a greater incentive to do so. He envisioned a defense similar to the "*adequate procedures*" defense, noted in the UK Bribery Act, where companies will be protected if a rogue employee engages in corruption and bribery despite a company's diligence in pursuing a FCPA compliance program. He also testified that "it will give corporations some measure of protection from aggressive or misinformed prosecutors, who can exploit the power imbalance inherent in the current FCPA statute—which permits indictment of a corporation even

for the acts of a single, low-level rogue employee—to force corporations into deferred prosecution agreements."

Wiessmann stated that the institution of a compliance defense will bring enforcement of the FCPA in line with US Supreme Court precedent, which has recognized that it is appropriate and fair to limit the legal doctrine of *respondeat superior* liability where a company can demonstrate that it took specific steps to prevent the offending employee's actions. Wiessmann argued that businesses may similarly be dissuaded from instituting a rigorous FCPA compliance program for fear that the return on such an investment will be only to expose the company to increased liability and will do little to actually protect the company. A FCPA compliance defense will help blunt this. He concluded by noting "It is unfair to hold a business criminally liable for behavior that was neither sanctioned by nor known to the business. The imposition of criminal liability in such a situation does nothing to further the goals of the FCPA; it merely creates the illusion that the problem of bribery is being addressed, while the parties that actually engaged in bribery often continue on, undeterred and unpunished. The FCPA should instead encourage businesses to be vigilant and compliant."

II. More Transparency in Declinations to Prosecute

Assistant Attorney General, for the Criminal Division of the US Department of Justice (DOJ), Lanny Breuer has responded to such suggestions that they are "formulaic" and not something which he believes would bring value to FCPA compliance or enforcement. However, the DOJ has gone a long way in laying out, in a very public manner, what it believes to be the minimum *best practices* of a FCPA compliance program. In each Deferred Prosecution Agreement (DPA) released, since at least November 2010, the DOJ has appended in Attachment C just such a document. If a Non-Prosecution Agreement (NPA) was entered into by the DOJ and the relevant party, the same type of document is appended as Attachment B. But whatever it is called, the document provides an excellent roadmap for a company to either benchmark its overall compliance program or to use as a good to implement such a program. I believe that the DOJ is to be commended for responding to requests for such greater guidance on what might constitute *best practices.*

I believe that there is one further step the DOJ can take which would greatly benefit companies and assist the DOJ in its goal to reduce corruption. That step would be to release information on the cases where the DOJ declines to prosecute. For all of the cases that the DOJ brings prosecutions, there are many more where it declines to do so, however, the reasons for such declination are not made public. I understand that companies which receive such declinations would not desire to have information published that they were even under investigation. Nevertheless there should be some mechanism by which the names of the parties, or other identifying information, can be scrubbed so that those of us in the compliance world would have specific information on factors which go into the DOJ's decision making process on whether to prosecute or more importantly decline to prosecute.

The release of such information would come very close to providing an affirmative defense or adequate procedures defense if a company could show that it followed the example of another case where there was a declination to prosecute. Further, such information would not lock the DOJ into a 'formulaic approach' as flexibility would be maintained to deal with different facts and circumstances. Lastly, this approach would not require an amendment to the FCPA. The DOJ could simply begin to release this information.

While the above is simply my suggestion, I hope that these hearings will bring out other ideas which will assist everyone in their overall goal—to do business more compliantly.