

The Justice Department Walks the Tightrope

The issue has been joined – should the FCPA be amended in order to promote US business interests? A number of NGOs joined together to announce their opposition to any relaxation of the FCPA. International anti-corruption organizations are hoping they can slow down organized business interests. The Chamber of Commerce continues to push its reform agenda. The Justice Department is playing it smart – promising “guidance” to gain time before Congress is pressured to act.

This is a very typical Washington scenario. It frequently occurs on other public policy issues affecting other industries. The end result for right now is Congress is unlikely to act before the election and will rely on the Justice Department’s guidance to respond to business lobbying interests.

The Justice Department has to walk carefully through this minefield. Unfortunately, the Justice Department continues to enforce aggressive legal interpretations in its FCPA settlement process. Its enforcement policies raise a risk that Congress may not be able to wait for the Justice Department to issue its promised guidance and will be forced to act.

Two continuing trends demonstrate my point.

1. **Jurisdiction** – In the recent *Magyar Telecom* settlement, the Justice Department and Magyar agreed that jurisdiction under the FCPA was established by the fact that the foreign official had an email account located on a United States server. The email account was not used to carry out the bribery scheme. This assertion of jurisdiction is novel. It exceeds the Justice Department’s reliance on correspondent bank accounts as a basis to assert jurisdiction. The existence of a US-based server by itself does not satisfy the FCPA’s jurisdictional requirement that a part of bribery scheme or act occurred in the US or involved the use of a US instrumentality.

In the first Shot Show trial, Judge Leon dismissed a count against a defendant where the only jurisdictional evidence was the sending of a package containing a purchase order from the UK to the US. Judge Leon dismissed the count finding a lack of jurisdiction. The impact of this ruling may be limited by the fact that the defendant sent the package in response to the government informant’s instruction.

If the Justice Department continues to assert jurisdiction based on weak, almost non-existent, factual justifications, it will only fuel concerns about its overreaching and the need to amend the FCPA.

2. **Evidence** – The recent *Aon* settlement at the end of 2011 centered on the misuse of educational and travel funds to provide government officials with travel to educational conferences. Contrary to the stated purpose of the use of these funds, expenses were paid for personal entertainment for officials and family members. The books and records contained false and misleading information. In some cases, the government relied on documentation which was incomplete or ambiguous as to the purpose and use of the funds. Sloppy record-keeping or omissions were turned into specific evidence of misconduct. In the context of the overall proof the Justice Department’s reliance on such evidence may have been reasonable, but the absence of

a stated purpose does not demonstrate beyond a reasonable doubt that the expense was used for an improper purpose. Such evidence may be sufficient in a civil context but surely does not satisfy the exacting standards for criminal cases.