An Excerpt From:

K&L Gates Global Government Solutions® 2012: Annual Outlook

January 2012

K&L GATES

Foreign Corrupt Practices Act/Anti-corruption: What to Expect in 2012

Over the past decade, and particularly in the last five years, law enforcement actions against international corruption have become commonplace. What is noteworthy as we enter 2012 is precisely how routine the activity in this area has become. The U.S. Department of Justice (DOJ) suffered a couple of embarrassing setbacks in its enforcement efforts, although these are unlikely to have any long-term impact on the program. Efforts to amend and scale back the Foreign Corrupt Practices Act (FCPA or the Act) have gained support both in Congress and some sectors of the business community, but even if adopted these will do little to alter the fundamental features of the enforcement landscape. The fact is that anti-corruption law enforcement achieved a certain level of stability, and we can expect, for 2012 and beyond, essentially more of the same—a regular flow of cases against both companies and individuals, primarily but not exclusively by U.S. authorities, many with penalties in the tens or hundreds of millions of dollars and, at least for an unlucky few, prison terms of multiple years.

Among the key things to watch for 2012 will be the following:

Vigorous FCPA prosecutions will continue by both the DOJ and the Securities and Exchange Commission.

Both agencies have specialized units working these cases, staffed with personnel who continue to gain experience and industry knowledge, which they will then bring to bear on other potential defendants. Even though fewer FCPA cases were brought in 2011 than in the prior year, this reflects no slackening of effort or any reduction of priority for these matters.

Concerned that the anti-corruption message is still not adequately appreciated by the private sector, authorities are emphasizing prosecution of individuals as well as corporate entities, and pursuing criminal charges rather than civil ones where they believe they can obtain convictions. This strategy carries risks, as criminal defendants are more likely to fight these cases, and some prosecutions failed in 2011. The DOJ obtained its first FCPA criminal conviction of a company in May 2011, only to see it thrown out due to prosecutorial misconduct, including the false testimony of a federal law enforcement agent. The trial of the first group of "shot show" defendants, who faced charges arising out of an FBI "sting" operation, ended with a hung jury and the declaration of a mistrial, as jurors apparently struggled with concerns about entrapment. But these were aberrations that do not alter the larger enforcement picture, which continues to reflect a long record of successful efforts. The DOJ settled many corporate cases and won convictions at trial in a significant number of cases against individuals, with some defendants sentenced to terms of more than five years. Other convicted defendants exhausted their appeals and prepared to report to prison. The DOJ also successfully faced down challenges to its interpretations of key legal provisions, such as whether employees of government-owned enterprises should be considered "government officials" under the FCPA.

Authorities reaffirmed their commitment to aggressive enforcement tactics such as wiretaps and confidential informants, and lucrative bounties are now available to whistleblowers under provisions of the Dodd-Frank Act. Both the DOJ and SEC made clear efforts through their settlements of various cases to demonstrate the benefits obtained by those who had self-reported violations and cooperated with enforcement authorities, although some observers remain skeptical, and such benefits do not lend themselves to precise quantification.

Efforts at FCPA reform are gaining some traction, but even if adopted, these changes will do little to alter the most central requirements of the Act.

Key proposals under consideration are a redefinition of who is a "government official" to exclude personnel of state-owned enterprises engaged in ordinary commercial activities, the creation of an affirmative defense to liability for companies with effective compliance programs, and the elimination of criminal successor liability. As welcome as these changes would be to the business community, it is difficult for Washington to enact any kind of legislation, much less provisions that could be characterized as easing up on improper corporate payments. And, it is unlikely that many of the FCPA cases being brought would come out differently under these revised standards. Perhaps most importantly, the FCPA enforcement program is a real money maker for the federal government. DOJ officials have been completely candid about the fact that the program brings in significantly more revenue than it costs, and that these proceeds help to

fund a large portion of the Department's criminal enforcement program. They have been clear about having "no intention whatsoever" of supporting what they see as efforts to "weaken the FCPA and make it a less effective tool for fighting foreign bribery."

UK authorities will be keen to find the right opportunity to bring a major Bribery Act case.

Britain's Serious Fraud Office (SFO) may look with envy on the large settlements routinely obtained by U.S. authorities, but for now at least the UK's budget woes are likely to force that office to choose its fights carefully. The SFO's head has indicated that the office will be cautious in selecting the right enforcement opportunities, and that the office is not looking for "easy quick wins." The SFO is expressly interested in cases against non-UK companies with a UK presence who are involved in foreign bribery, but are in particular seeking cases in which a UK company can be said to have lost out to an unscrupulous competitor. The office disclaims any intention of wasting its scarce resources on mere technical violations.

International anti-corruption enforcement efforts beyond the U.S. and the UK remain uneven and to a large extent non-existent, but there is steady, albeit very slow, improvement on this score.

Signatories to the OECD Convention on Bribery, which include virtually all of the most developed economies, have committed to enact legislation much like the FCPA, criminalizing bribery of foreign officials in connection with commercial transactions, and most have had such laws in place since 2002. According to Transparency International, however, only seven of these countries "actively" enforced these laws: the United States, the UK, Germany, Italy, Norway, Denmark, and Switzerland. Nine others engaged in "moderate" enforcement, while the remaining 21 countries evaluated had "little or no" enforcement. The prospects for improvement on this score remain uncertain. At the same time, during 2011 there were highly publicized initiatives in Russia and China to upgrade their laws against bribery of foreign officials, and while enforcement of these laws remains uneven, when enforcement does occur it may be exceptionally severe. Law enforcement authorities are increasingly cooperating and sharing information on an international basis, and to the extent non-US authorities become active in anticorruption enforcement, these issues will increasingly involve cross-border issues and pose complex challenges to resolve.

Matt T. Morley (Washington, D.C.)
matt.morley@klgates.com

Brian F. Saulnier (Pittsburgh, Dubai)
brian.saulnier@klgates.com

K&L GATES

Anchorage Austin Beijing Berlin Boston Brussels Charleston Charlotte Chicago Dallas Doha Dubai Fort Worth Frankfurt Harrisburg Hong Kong London Los Angeles Miami Moscow Newark New York Orange County Palo Alto Paris Pittsburgh Portland Raleigh Research Triangle Park San Diego San Francisco São Paulo Seattle Shanghai Singapore Spokane Taipei Tokyo Warsaw Washington, D.C.

K&L Gates includes lawyers practicing out of 40 offices located in North America, Europe, Asia, South America, and the Middle East, and represents numerous GLOBAL 500, FORTUNE 100, and FTSE 100 corporations, in addition to growth and middle market companies, entrepreneurs, capital market participants and public sector entities. For more information about K&L Gates or its locations and registrations, visit www.klgates.com.