A Corporate Self-Compliance Program for the FCPA? Volkov's Proposal

At the "*Examining Enforcement of the Foreign Corrupt Practices Act*" hearings on November 30, 2010, before the US Senate Judiciary Committee, Subcommittee on Crime and Drugs, Michael Volkov presented an interesting idea which he believes will maximize incentives for companies to comply with the Foreign Corrupt Practices Act (FCPA). In his prepared statement, and testimony before the sub-committee, Volkov indicated that the current Department of Justice (DOJ) policy of self-disclosure places companies in the Hobson's choice of trying to divine the benefits of self-disclosure to the DOJ. Volkov stated that the DOJ only offers "vague promises of benefits and little to no certainty as to the results" all done with the DOJ preserving its discretion to impose any penalty as they see fit. Put another way, should a company self-disclose to the DOJ with no certainty as to the result or punishment that it might receive or should they attempt to investigate and resolve the problem internally and then implement a more robust compliance regime while it runs the risk that the DOJ may learn of past violations.

Volkov's suggestion is that a more balanced approach is needed. This would provide to companies even greater incentive to comply with the FCPA while distinguishing those companies which engage in flagrant FCPA violations from those companies which are trying to do the right thing in the FCPA compliance arena. To further these specifications, Volkov has advocated the adoption of a limited amnesty program for corporate self-compliance. Volkov acknowledged that the specific program that he has articulated was originally proposed by former Judge Stanley Sporkin, the "so-called father of the FCPA", and that this proposal was also set forth in the Seaboard Report.

Volkov's proposal consists of the following elements:

1. A participating company agrees to conduct a full and complete review of the company's FPCA compliance program for the five previous years.
2. This internal review is to be conducted jointly by a major accounting firm or specialized forensic accounting firm and a law firm.
3. The company agrees to disclose the results of the legal-accounting audit to the DOJ, Securities and Exchange Commission (SEC), its investors and the public.
4. If the company discovers any FPCA violations in the audit, the Company agrees to take all steps to eliminate the violation(s) and implement appropriate controls to prevent further violations.
5. The company would subject itself to an annual review for five years to ensure that FCPA compliance was maintained.
6. The company would retain a person similar to an independent FCPA compliance monitor who would annually certify to the DOJ and SEC that the company was in FCPA compliance.
7. In exchange for this, both the DOJ and SEC would agree not to initiate any enforcement actions against a company during this period except in the situation where a FCPA violation was found and it "rose to ***flagrant*** or ***egregious*** levels."

Volkov has argued that this self-compliance program would create "incentives for companies to adopt and maintain robust compliance measures and reduce the case load and investigative burden of governmental agencies" charged with enforcement of the FCPA. As we have previously noted in a prior blog, in the Preamble to the FCPA, US Congress set out three clear policy goals for the enactment of the legislation. First, was the public revelation that over 400 US companies had paid over $300 million to bribe foreign governments, public officials and political parties and such payments were not only "unethical" but also "counter to the moral expectations and values of the American public". Second was that the revelation of bribery, tended "to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations". Third was by enacting such resolute legislation, US companies would be in a better position to resist demands to pay bribes made by corrupt foreign governments, their agents and representatives. While it is arguable that this proposal for self-compliance does help foster these Congressional goals, there is currently no information available which would suggest there is either (1) a case load burden within the DOJ or (2) an investigative burden within the FBI, or any other investigative agency, which would mandate the implementation of this program.

Volkov noted that the Anti-Trust Division of the DOJ has a Corporate Leniency Policy and a Leniency Policy for Individuals, which allow corporations and individuals to avoid criminal charges and fines by being the first to confess participation in a criminal anti-trust violation. So there certainly is DOJ precedent for a leniency type of program. However, the proposal for self-compliance would appear to have a different focus, as there is no confessional of criminal conduct but rather the offer to self-investigate and then self report the results. Additionally, Senator Specter's comments at the hearing regarding the lack of criminal prosecution of individuals under the FCPA would seem to bode poorly for any type of proposal which would provide blanket amnesty.

Even with the above caveats, we welcome Volkov's proposal as a useful conduit to move forward the discussion on enforcement of the FCPA. We thank Mr. Volkov for his well reasoned proposal and his articulate testimony and look forward to continuing the debate and dialogue.