ETHICS CORNER

Penalties Get Tougher For FCPA Violations

BY FRED SHAHEEN AND NATALIA GEREN

In an increasingly global business climate, most government contractors cross paths with the Foreign Corrupt Practices Act. FCPA's anti-bribery provisions criminalize any payment or offer of anything of value to a foreign official, political party official, candidate for public office or any intermediary for the purpose of obtaining or retaining business. The FCPA also bars issuers from misrepresenting payments on their books and records and thus, potentially concealing bribes.

Recent high profile FCPA enforcement actions demonstrate both increased concentration on enforcement and punishment of unethical behavior. Penalties for violators are increasing.

The most recent Department of Justice and Securities and Exchange Commission enforcement actions provide insight into the government's views regarding FCPA compliance and best practices. Compliance costs are increasing, but these recent penalties demonstrate the enormous business and financial risks of non-compliance.

Recent enforcement actions underscore the government's zero-tolerance policy. In March, Titan Corporation pled guilty to a three-count information stemming from improper payments made by a foreign sales agent to a Benin government official. Titan was required to pay the largest FCPA penalty ever ($28.4 million), including disgorgement of profits stemming from the illicit payments, and Lockheed Martin declined to acquire Titan due to the FCPA violations discovered during the due diligence.

In published settlement documents explaining the harsh penalties, DOJ and SEC highlighted Titan's lack of any formal company-wide FCPA policy or procedures and its failure to train or monitor foreign agents. The DOJ-Titan Agreement says:

"In its 23 years of existence prior to 2004, Titan has never had a FCPA compliance program or procedures. Titan's only related 'policy' is a statement in Titan Corporation's Code of Ethics, which all Titan employees were required to sign annually, stating 'employees must be fully familiar with and strictly adhere to such provisions as the Foreign Corrupt Practices Act.' Titan did not enforce that policy nor did it provide its employees with any information concerning the FCPA." DOJ also required Titan to retain an independent consultant to assist in instituting a strict compliance program and internal controls to prevent future FCPA violations—an increasingly common settlement requirement.

In January, Monsanto Company agreed to pay a monetary penalty of $1 million resulting from a bribe paid by an employee to a senior Indonesian Ministry of Environment official, and falsely certifying the bribe as "consultant fees" in corporate records. DOJ required internal compliance measures, cooperation with criminal and SEC civil investigations, an independent compliance audit of the compliance program and ongoing review of these measures. DOJ's "Remedial Compliance Program" also mandated the empowerment of a corporate official to vigorously audit FCPA compliance.

In July 2004, ABB Ltd., based in Zurich, Switzerland, settled an FCPA enforcement action with SEC for $5.9 million in disgorgement and prejudgment interest and $10.5 million penalty. The SEC's complaint charged that the company "lacked any meaningful internal controls to prevent or detect the illicit payments" (made by its U.S. and foreign-based subsidiaries doing business in Nigeria, Angola and Kazakhstan, totaling more than $1.1 million) and "improperly recorded these payments in its accounting books and records."

The government's message is clear: a company engaged in cross-border transactions must have a comprehensive, FCPA compliance program with support from senior management. Such a program must include effective employee, consultant and foreign-agent training provisions.

An internal audit system is considered a necessary monitor on whether corporate procedures are followed by all employees, agents and distributors. This was articulated in the February 2005 DOJ and SEC settlement with InVision Technologies Inc., now a General Electric Company entity.

Government officials said InVision knew of the high probability that employees, sales agents and distributors selling explosive-detection machines to airports in China, the Philippines and Thailand, made or offered improper payments to foreign government officials. GE discovered the transactions while performing due diligence in acquiring InVision. The unmonitored activities of these individuals resulted in an $800,000 criminal penalty and disgorgement of almost $600,000 in profits.

In a January 20, 2003 memorandum on "Principles of Federal Prosecution of Business Organizations," Deputy Attorney General Larry D. Thompson noted that when business organizations "take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation . . . such conduct should weigh in favor of a corporate prosecution." Conduct designed to impede a government investigation is clearly unethical. But "cooperation" under Thompson's memo denotes something more than just abstaining from such behavior. Indeed, Thompson emphasized that, not only is timely and voluntary disclosure of wrongdoing and cooperation with government inspectors necessary but, in many circumstances, waiver of corporate attorney-client and work product protections may be required for cooperation to be considered complete.

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