Foreign Corrupt Practices Act

WILMERHALE

Enforcement Authorities Signal Increased Priority for FCPA Enforcement with Major Speech and Two New FCPA Settlements

Several recent developments signal that US authorities are increasing their efforts to enforce the Foreign Corrupt Practices Act (FCPA).

First, Assistant Attorney General Alice Fisher, who heads the Criminal Division of the Department of Justice (DOJ), recently delivered a major policy speech highlighting FCPA enforcement as a priority for the DOJ. She said that the DOJ will be devoting additional prosecutorial and investigational resources to enforce the FCPA, and emphasized that companies can mitigate penalties by voluntarily disclosing FCPA violations, instituting targeted and effective compliance programs, utilizing the DOJ FCPA advisory opinion procedure, and engaging in thorough due diligence prior to engaging in international business transactions.

Second, the DOJ and the Securities and Exchange Commission (SEC) announced the resolution of enforcement cases against Norway-based Statoil ASA and US-based Schnitzer Steel Industries Inc., as well as its South Korean subsidiary.

Finally, the DOJ released an advisory opinion authorizing a US company to contribute money to a foreign government for the benefit of local customs officers, to promote enforcement of intellectual property rights.

These developments highlight the continued FCPA enforcement risks faced by businesses that engage in international transactions, the importance of compliance programs to reduce the risk of FCPA violations, and the importance of early identification of potential FCPA violations to manage the risks related to the potential violations.

The FCPA's Antibribery and Accounting Provisions

The FCPA's antibribery provisions make it unlawful for any issuer, domestic concern or person acting within the United States to offer or make a payment of anything of value directly or indirectly to a foreign official, international organization official, political party, party official, or any candidate for public office, for the purpose of influencing that official to assist in obtaining or retaining business. (15 U.S.C. §§78dd-1 to -3.) A covered company can be held liable for payments made on its behalf by agents or distributors.

The FCPA's accounting provisions require companies with securities listed in US trading markets to keep books, records and accounts that accurately and fairly reflect any transaction and disposition of assets in reasonable detail, and to maintain an adequate system of internal accounting controls. (15 U.S.C. §78m(b).) A covered company is responsible for ensuring that its controlled subsidiaries, including foreign subsidiaries, comply with the FCPA's accounting provisions.

Assistant Attorney General Highlights FCPA as an Enforcement Priority

Alice Fisher, Assistant Attorney General for the Criminal Division of the DOJ, gave the keynote address at a conference on the FCPA held in Washington DC on October 16, 2006—which she characterized as the first time a sitting assistant attorney general has given a policy speech regarding the FCPA. She noted that the DOJ will continue to add prosecutorial and investigational resources to strengthen FCPA enforcement. Fisher emphasized that enforcement of the FCPA is a high priority for the DOJ, both because it is an important part of the department's mandate to combat public corruption and because enforcement will level the playing field for law-abiding US businesses.

In a separate discussion at the conference, Michael Anderson, chief of the FBI's Public Corruption Unit, echoed the message that FCPA enforcement is a high government priority. He noted that FCPA enforcement,

part of the FBI's focus on combating public corruption, follows only counterterrorism and counterintelligence efforts among federal law enforcement priorities.

Fisher also drew attention to the DOJ's recently concluded cases against Statoil and Schnitzer Steel Industries, described below, and highlighted four policy issues that have had or will have a significant role in the DOJ's enforcement efforts.

Voluntary Disclosures
Fisher strongly encouraged voluntary disclosures by parties that are facing potentially serious FCPA violations. Although she declined to guarantee a specific outcome when the DOJ receives a voluntary disclosure, she emphasized that a party will always realize a benefit if it discloses violations fully and early, and that the benefit will be real. She suggested that a voluntary disclosure will not necessarily result in reduced penalties where the violation is egregious, but that the DOJ will consider a voluntary disclosure as a factor when deciding whether a case can be resolved with a more favorable outcome, and that in some cases the government has decided to not take any action after a company has voluntarily disclosed violations.

Independent Monitors
Fisher noted that several recent cases that have been resolved with plea agreements or deferred prosecution agreements have also imposed a requirement that the party retain an independent consultant to monitor its compliance with the FCPA. She said that there is no policy of imposing the extremely intrusive and costly independent monitor requirement in all resolutions of FCPA cases. Instead, the decision will be made after considering whether the company's existing compliance program is thorough, targeted and effective.

Opinion Procedure
Few companies use the DOJ Opinion Procedure to obtain the DOJ's views regarding the lawfulness of a proposed transaction. Fisher encouraged more frequent usage of the Opinion Procedure and pledged that the DOJ will strive to provide timely responses.

Due Diligence
Fisher stressed the importance of engaging in due diligence prior to undertaking transactions involving international business, including mergers and acquisitions. She further emphasized the importance of resolving any FCPA problems before completing a transaction, suggesting that a party that willfully disregards red flags in a transaction may be held liable for the other party's past and future misdeeds.

Exceptional Cooperation Results in Deferred Prosecution Agreement, $21 Million in Fines and Independent Monitor Requirement for Statoil ASA

On October 13, 2006, the DOJ and the SEC settled cases against Statoil ASA, a Norwegian company listed on the New York Stock Exchange. Statoil acknowledged making indirect payments to an Iranian official to induce the official to use his influence to direct oil and gas contracts to Statoil.

The government's documents alleged that certain corporate executives, with the knowledge that the official was in a position to influence the award of contracts, entered into an agreement to pay $15 million to the official over 11 years through a sham consulting company in a third country. The DOJ specifically noted that an earlier version of the contract would have structured the payments as a "success fee" and payments to the "charity" of the Iranian official's choice. Statoil subsequently made two payments totaling over $5 million—routed through US banks—before the payments came to the attention of the CFO and were halted. The payments were recorded in Statoil's books as legitimate consulting fees.

Statoil was subject to investigations in Norway and by the DOJ and the SEC in the United States. While Norwegian authorities reportedly found only evidence of a technical violation under Norwegian law and no evidence that the payments affected decision-making in Iran, US enforcement agencies came to a different conclusion. The DOJ charging documents reflect that—as a result of the payments—the Iranian official gave Statoil access to nonpublic government information and competitor bid documents, and Statoil succeeded in obtaining a significant contract to develop an oil and gas field.

The SEC found that, in addition to falsifying company books by recording the payments as legitimate consulting fees, Statoil management responsible for the contract circumvented the company's internal controls by concealing the true nature of the consultancy agreement, concealing the identity of the true parties, and violating company rules by making payments under the contract to a party not identified in the contract.

To settle the case with the DOJ, Statoil agreed to pay a penalty of $10.5 million and enter into a three-year deferred prosecution agreement. To resolve the case with the SEC, Statoil agreed to pay disgorgement of an additional $10.5 million, against which the SEC credited the $3 million fine that Statoil paid to Norwegian authorities. Both resolutions require Statoil to retain an independent compliance monitor.

Assistant Attorney General Fisher specifically noted that the deferred prosecution agreement was the result of Statoil's "exceptional" cooperation, significant remedial efforts, and the fact that Norwegian authorities had also investigated and sanctioned Statoil. She also noted that this criminal enforcement action against a foreign issuer was the first of its kind and was intended as a clear message to foreign companies trading on the US exchanges that they must comply with US law.

Voluntary Disclosure and Exceptional Cooperation Result in Deferred Prosecution Agreement, Independent Monitor and $7.7 Million Penalty for Schnitzer Steel, and Guilty Plea and $7.5 Million Penalty for Foreign Subsidiary

On October 16, 2006, the DOJ and SEC settled charges of FCPA antibribery and books and records violations, conspiracy, and wire fraud against Schnitzer Steel Industries Inc., a US issuer, and its wholly owned Korean subsidiary. Schnitzer and its subsidiary accepted responsibility for paying more than $1.8 million in kickbacks over five years to employees of government-owned steel companies in China and private customers in China and South Korea. These payments were alleged to be for the purpose of inducing the purchase of scrap metal from Schnitzer.

The Korean subsidiary's plea agreement states that it paid the bribes and kickbacks in the form of "commission payments" and "gratuities;" "refunds" paid to employees from inflated prices charged to the customers; and gifts and entertainment, such as jewelry, gift certificates, perfumes and the use of the subsidiary's golf club memberships and time-shares. The subsidiary made the payments using funds from a US bank account, funneled through off-the-books bank accounts in South Korea.

The DOJ claimed jurisdiction over the Korean subsidiary as an agent for the US parent and—because the subsidiary transmitted requests for approval and wire transfers to the United States—as a "person" acting within the territorial jurisdiction of the United States.

The DOJ charges were settled with a deferred prosecution agreement with Schnitzer and a guilty plea and $7.5 million criminal fine for the Korean subsidiary. The SEC ordered Schnitzer to pay a penalty of $7.7 million in disgorgement and interest on top of the $7.5 million fine levied by the DOJ against its subsidiary. Both settlements required Schnitzer to retain an independent compliance monitor.

The DOJ has characterized the package of a deferred prosecution agreement for the parent and a guilty plea for the subsidiary only as a result of Schnitzer's:

- Voluntary disclosure;
- Extensive internal investigation, the results of which were promptly shared with the government;
- Extensive cooperation with the government, including bringing in foreign witnesses at company expense;
- Appropriate disciplinary action;
- Replacement of senior management; and
- Significant remedial steps, including the adoption of a robust compliance program.

DOJ Approves of Payments to African Customs Officials through the National Government, as Incentives for the Officials to Seize Counterfeit Goods

Also on October 16, 2006, the DOJ issued an Opinion Procedure Release concerning a proposed contribution of $25,000 to the customs department of an African country. Under the proposed program, the customs department would then distribute the money to local customs officials as an incentive for them to seize counterfeit products bearing the trademarks of the requesting party and its competitors. The request noted that the payments were necessary because the government of that country paid a small percentage of any transit tax collected to local customs officials, giving a disincentive to such officials to distinguish between authentic and counterfeit goods transiting through the country.

The requesting party stated that—in addition to other safeguards—it would enter into a memorandum of understanding with the customs department establishing the terms of the program, and would ensure that the program was consistent with local laws and that the customs department would have sole control over, and responsibility for, the distribution of the funds.

The DOJ approved of the proposed payment, provided the requesting party adhered to the terms of its request and the caveats in the Opinion Procedure Release. In commenting on the release, Assistant Attorney General Fisher noted that the payment was to the government (rather than directly to officials), that there was no corrupt intent, and that the incentive was acceptable as structured.

Practical Advice

US companies—including those that control foreign subsidiaries, and foreign companies that do any business in the United States or whose shares are traded on US exchanges—should seek to implement a comprehensive FCPA compliance program and seek to apply that program to their subsidiaries.

The following lessons emerge from these developments:

- Enforcement authorities will continue to vigorously prosecute alleged violations of the FCPA, with increasingly little regard for the degree of connection that the activity has with the United States. The DOJ and SEC will continue to pursue violations by US companies, but will also pursue foreign companies acting as agents of US parties, foreign companies that are traded on US exchanges, and even foreign parties that have only fleeting contacts with the United States (e.g., emails and wire transfers).
- The DOJ and FBI are actively working to support foreign enforcement efforts and to seek foreign assistance in US enforcement efforts. As combating public corruption increasingly becomes an international priority, companies—particularly in Europe—are more likely to be subject to investigations and penalties in multiple jurisdictions.
- Enforcement authorities will continue to place heavy emphasis on early and full disclosure of violations and genuine cooperation as significant mitigating factors, though the "credit" that will be given for a voluntary disclosure in a particular case remains uncertain.
- Where FCPA concerns arise prior to a transaction, it is critical that they be addressed before the transaction is completed. Enforcement authorities will view failure to address such concerns as an aggravating factor in any investigation. To resolve concerns, companies should consider the range of options available and their pros and cons—including internal remediation, voluntary disclosure or submission of an opinion request to the DOJ.
- Companies can reduce the risk of violations, place themselves in a position to evaluate options to resolve FCPA concerns, and reduce the likelihood of a severe penalty in case of any violations if they proactively adopt a comprehensive compliance program and engage in thorough due diligence prior to entering into international business transactions.
- Companies entering into consulting agreements should implement controls to prevent payments that are characteristic of bribes. Such controls should include, for example, a requirement that the company conduct and document thorough due diligence to uncover FCPA concerns; a requirement that a written contract be established with specific antibribery provisions; a prohibition against payments to parties in countries other than the place of performance; a requirement that the consultant's scope of work be precisely defined; and a prohibition against payments under the contract to parties not listed in the contract.

FOR MORE INFORMATION ON THIS OR OTHER FCPA MATTERS, PLEASE CONTACT:

Roger Witten +1 212 230 8850 roger.witten@wilmerhale.com

Kimberly Parker +1 202 663 6987 kimberly.parker@wilmerhale.com

WILMER CUTLER PICKERING HALE AND DORR LLP

wilmerhale.com ▪ Baltimore ▪ Beijing ▪ Berlin ▪ Boston ▪ Brussels ▪ London ▪ Munich ▪ New York ▪ Northern Virginia ▪ Oxford ▪ Palo Alto ▪ Waltham ▪ Washington