

Experts Highlight Increased Focus On Individuals In FCPA Prosecutions

The Department of Justice (DOJ) has in recent years ramped up its prosecution of individuals under the Foreign Corrupt Practices Act (FCPA) and also deepened its cooperation with export control officials in the Commerce Department, and both of these trends are expected to continue in 2010, Washington FCPA experts said in interviews.

Additionally, DOJ has announced that it will this year pay increased attention to the pharmaceutical industry, replicating a recent push to tackle corruption in the medical devices trade.

The increasing focus on the prosecution of individuals at least partly explains why 2009 saw three major FCPA trials, which were the first trials since 2004. Individuals are less motivated to settle cases than corporations because of the possibility of facing jail time if they do settle, meaning trials are more likely, legal sources said.

The possibility of facing jail time also means that increased prosecution of individuals, which started under the Bush administration and which continued in 2009, is widely seen as an effective way to help ensure that companies conform to the FCPA, one legal source said.

This source said this focus could even intensify in 2010, as the Obama administration has shown that it does not want to provide any extra leeway to the economic elite. Already, companies are being more cautious when making business arrangements in order to ensure they do not violate the FCPA, this source said.

Lanny Breuer, DOJ Assistant Attorney General, said in a Nov. 17 speech that the year prior was the “most dynamic single year” for FCPA enforcement since the act was made law. He said this was the case not just because of record fines — \$1.6 billion in December 2008 for Siemens and \$579 million for Halliburton, compared to a previous record fine of \$44 million — but because a record number of cases were brought against individuals.

“That is no accident. In fact, prosecution of individuals is a cornerstone of our enforcement strategy,” he said. “Put simply, the prospect of significant prison sentences to individuals should make clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations.”

The FCPA cases that went to trial this year included the conviction of Frederic Bourke for conspiracy to bribe officials in Azerbaijan, the conviction of former congressman William Jefferson on conspiracy involving the bribery of Nigerian officials and the conviction of two film executives for bribing a Thai official. Justice is seeking a life sentence against one of the individuals in the last case.

Roger Witten of the law firm Wilmer Hale agreed that the three trials have resulted due in part to an increased focus by DOJ on prosecuting individuals. He said that equally of note is that the sheer volume of cases has continued to be high, continuing at least 30 cases in 2009, about the same as 2008.

Experts said the Justice Department has increased its use of traditional law enforcement techniques such as surveillance in order to capture FCPA violations. They said that the percentage of cases resulting from voluntary disclosures is at an all-time low and may reach one-quarter of all cases this year.

In his speech last November, Breuer also announced that one area in which the Justice Department will focus in 2010 will be overseas sales in the pharmaceutical industry. This is because the “depth of government involvement in foreign health systems, combined with fierce industry competition and the closed nature of many public formularies, creates, in our view, a significant risk that corrupt payments will infect the process.”

Overall, Breuer stressed that DOJ will “continue to focus our attention on areas and on industries where we can have the biggest impact in reducing foreign corruption,” according to a transcript of his remarks.

Legal sources said that 2010 will see the announcement of the results of major ongoing investigations into the medical device industry and that the focus on pharmaceuticals comes as evidence against drug companies has turned up in the medical device investigations.

Greg Husisian, counsel at the firm Foley & Larder said that DOJ has also shown signs of an interest in going after high-technology fields such as telecommunications and can be expected to continue existing efforts in the energy sector and defense industry.

Witten agreed that high-tech firms such as those dealing with telecommunications are higher risk given their interactions with government officials in connection with government procurement and licensing decisions. He said that many of the smaller tech firms appear not to have particularly well-developed and resourced compliance programs even though they do business internationally.

Husisian said other trends that can be expected to continue into 2010 include increasing cooperation of U.S. govern-

ment with foreign governments; increasing emphasis on bribery, including through use of dedicated FBI agents to ferret out information on bribes; an increasing expectation that corporations will not only have in place compliance systems, but also will take steps to test and an increasing use of corporate monitors as part of settlement agreements.

Experts said that the increased cooperation between DOJ and Commerce's Bureau of Industry and Security as well as the Office of Foreign Assets Control in Treasury has occurred because the same companies that violate export controls tend to be those that are willing to break the law against foreign bribery.

"Where companies commit export-control violation, there always is temptation to hide the violation by recording the expenses improperly, which leads to [a] FCPA violation for [firms] who are publicly traded and have to keep good books and records," Husisian said.

Husisian and other lawyers said that there has been increased enforcement of sanctions legislation, at a steadily increasing pace since the Sept. 11 terrorist attacks and these have in turn yielded more FCPA cases.

Another major trend emerging has been the increased focus on corruption by other countries. One source cited hopeful signs in China. Others noted the cooperation between the U.S. and Germany in the blockbuster Siemens settlement and said that Germany is taking a tougher stance toward corruption compared to the past, when bribes could be itemized on tax returns.

Billy Jacobson, a former assistant chief of the Department of Justice's Fraud Division and now the vice president and chief compliance officer at an oil services firm called Weatherford, said that the Organization for Economic Cooperation and Development (OECD) has been pivotal in increasing international cooperation between law enforcement agencies.

In the last year, he pointed out, OECD has been encouraging members to outlaw small facilitating payments, which are permitted under the U.S. FCPA.

On Dec. 9, OECD released its 2009 "Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions." In that document it "recommends, in view of the corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law that Member countries should ... undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon."

Jacobson, and other sources, said that there appears to be no legislative push in Congress to include these minor payments under the FCPA. On the other hand, DOJ has made statements intended to discourage this practice and many corporate compliance programs have moved to limit them. Some sources said that DOJ could start to take an "aggressive" interpretation of what does and what does not qualify as such a payment.

However, Witten argued that a focus on small facilitating payments would be a waste of limited resources that could otherwise be devoted to larger and more significant matters connected to such things as government contracts and licensing decisions.

Experts will also be looking closely in 2010 at the progress of a new bribery bill in the British parliament. That bill was introduced in the House of Lords in November and the current version would create strict civil liability for companies engaged in corrupt practices.

These experts said the bill would codify existing powers and make enforcement occurring outside of the United Kingdom much easier. Sources agreed that despite this, the U.S. will continue to be by far the most strict of OECD members in enforcing its anti-corruption law.