

A Rising Voice On FCPA Compliance — The Courts

Law360, New York (June 24, 2013, 4:35 PM ET) -- One Foreign Corrupt Practices Act compliance topic we are often asked about by clients is how government investigations start. The U.S. Department of Justice and the U.S. Securities and Exchange Commission have developed a number of mechanisms largely within their control (including whistleblowers and cross-industry investigations) to learn about bribery allegations. There are also mechanisms outside of government control, such as investigative journalism, that can identify bribery allegations and effectively force the government's hand into investigating them.

Recent events surrounding FCPA allegations against IBM Corp. suggest a new actor that can force the broadening or deepening of existing FCPA investigations: the U.S. courts.

In March 2011, the SEC entered a proposed agreement with IBM to settle alleged books and records and internal controls violations related to the operations of IBM subsidiaries and affiliates in South Korea and China. The SEC alleged an IBM South Korea subsidiary employee paid bribes of cash, improper gifts, travel, and entertainment expenses and joint ventures in order to help it win bids and obtain other business related to mainframe computers. The SEC also alleged that IBM China created slush fund accounts to pay for travel and entertainment expenses that were not related to bona fide business purposes. Under the settlement, IBM agreed to pay \$10 million in disgorgement, interest and fines.

The case was assigned to Judge Richard Leon of the U.S. District Court for the District of Columbia. At a hearing in December 2012, as reported by the Wall Street Journal, Judge Leon asked IBM to report to the court and the SEC annually on its FCPA compliance efforts, report any future FCPA violations, and report any new criminal or civil requirements. IBM agreed to report future improper payments and related books and records violations, but indicated it could not report accounting inaccuracies not tied to improper payments. Judge Leon reportedly pressed for data on why such reporting would be unduly burdensome for IBM.

The latest development in the matter came in an April 30, 2013, 10-Q filed by IBM. There, IBM reported new DOJ investigations into FCPA allegations in Poland, Argentina, Bangladesh and Ukraine. Interestingly, the filing also noted "the DOJ is ... seeking information regarding the company's global FCPA compliance program." While this inquiry could have been prompted by many factors, it seems to us very possible that the DOJ is trying to demonstrate its own effectiveness to the judiciary.

The emergence of the court inquiry into IBM complicates how many companies have begun to orient their compliance practices. In November 2012, the DOJ and SEC published the resource guide to the U.S. Foreign Corrupt Practices Act, which provides general guidelines for establishing a compliance policy and provides information about specific features of compliance policies. The delayed IBM settlement, followed by a DOJ investigation that extends to global tracking of internal reporting, indicates not only that the DOJ and SEC are not the final authority on matters of FCPA compliance, but that courts may be more active in policing compliance.

Even though the guide refutes any suggestion of safe harbor for a company that takes certain compliance measures listed in the guide, the developments in IBM go further to suggest that corporate compliance efforts should not necessarily be tailored only to what the DOJ and SEC want to see. Of course, the government could also absorb what it understands to be Judge Leon's requirements in the IBM settlement. If the IBM settlement leads to a new system for identifying and reporting corruption within that company, it may become a general feature of future settlement requirements, in order to protect the government against further judicial scrutiny. In turn, companies may wish to consider now whether their internal reporting systems can be upgraded.

--By Scott Maberry and Mark Jensen, Sheppard Mullin Richter & Hampton LLP

Scott Maberry is a partner and Mark Jensen is an associate in Sheppard Mullin's Washington, D.C., office.

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