Government's new FCPA guidelines leave prosecutors plenty of flexibility, defense lawyers say

White-collar lawyers wanted more guidance in new standards for 1977 act

By Hadley Robinson

Defense attorneys did not get the specifics they were hoping for when the government issued extensive guidelines on the Foreign Corrupt Practices Act earlier this month.

Instead of clarifications on the benefits of self-disclosure, what constitutes a foreign official and what regulators expect of a compliance program, attorneys found a bundle of the government's previously stated positions, opinions and case law in the 120-page document.

"I think the surprising thing about the guidance is how unsurprising it was," said Robb C. Adkins, a San Francisco-based partner at Winston & Strawn LLP, who has both prosecuted and defended FCPA cases.

The Department of Justice and the Securities and Exchange Commission agreed last fall to issue guidance on the FCPA, following pressure from the U.S. Chamber of Commerce and attorneys grappling with how to advise their clients. Enacted in 1977, the act cracks down on companies giving bribes or making other inappropriate payments when doing business in other countries.

With FCPA enforcement efforts increasing in recent years, many companies want more government assistance in determining the requirements for staying in compliance, attorneys say, because there is very little case law to give clarity.

Enforcement spiked in 2010, with 23 companies paying a record $1.8 billion in fines and penalties, and stayed high in 2011, when 15 companies paid $506 million, according to Richard L. Cassin of CassinLaw LLC, who writes a blog on the FCPA.

Some attorneys acknowledged the new guidelines show extensive effort from the Department of Justice, and that having a roadmap - even if it's not a new roadmap - is useful.

"I think it's going to be helpful for some companies with some questions," said Pamela R. Davis, a San Francisco-based partner at Orrick, Herrington & Sutcliffe LLP. "The bigger questions are still out there." The most frustrating vagueness in the guidelines for Davis is the government's position on self-disclosure. The government does not have a detailed policy on incentives to voluntarily cooperate and disclose internal issues, leaving defense attorneys in a tough position to help their clients.

"In advising companies, it is often times the most difficult part of the engagement," Adkins said. "It's difficult because there's not clear guidance on what the benefit is."

"Both DOJ and SEC place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters," the guidelines state.

Davis said that sentence does not help much and just repeats what government officials have already said.
"The government will issue statements like, 'because the company cooperated we've given them a reduced penalty,'” Davis said. “How would you know what it would have been had they not self-reported?”

Other ambiguities that remain despite the new paperwork are what exactly the government wants in a company's compliance program and what constitutes a foreign official.

But Latham & Watkins LLP partner Timothy P. Crudo, a former federal prosecutor, was not surprised there weren't specifics on those issues.

"The government is trying to be helpful and provide some guidance, but at the same time they want to leave themselves as much flexibility as possible,” he said. ”This isn't always black and white. The government is not going to tie its own hands.”

Bethany Hengsbach, a Los Angeles-based partner at Sheppard, Mullin, Richter & Hampton LLP, was positive about the guidelines. She noted some of the specific examples and hypotheticals the government gave on what constitutes a gift and what is allowed in terms of hospitality and entertainment in business relationships with foreign officials.

"They really confirm a lot of what we thought over the past couple years and a lot of what we are advising,” Hengsbach said. ”This is the first time we have concrete comment.”

One thing Munger, Tolles & Olson LLP partner John Owens said is clear in the new guidelines is that strict FCPA enforcement is likely to continue.

"It shows me that they certainly are not backing away from these cases,” he said. ”The SEC and DOJ will show no sympathy to companies going forward who don’t set up compliance programs.”

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