

Getting Specific About FCPA Compliance

Law360, New York (June 29, 2011) -- On April 8, 2011, the U.S. Department of Justice announced that it had reached a settlement with Johnson & Johnson and its subsidiaries for Foreign Corrupt Practices Act violations. Compared to prior FCPA settlements, the DOJ elaborated much more specific compliance measures that it expected Johnson & Johnson to take as part of the settlement.

When considered together with the decline in the number of corporate compliance monitors assigned since late 2010, the Johnson & Johnson settlement may signal that the DOJ is considering the use of enhanced compliance requirements in lieu of independent compliance monitors, even in some cases involving companies with multiple FCPA violations.

Compliance Guidelines

It has become a common practice in the past year for the DOJ to provide standard guidelines for an effective corporate compliance program as an attachment to settlement agreements. Those guidelines outline the steps the DOJ considers to be essential in effective FCPA programs, and provide a general template for companies to address any deficiencies in their internal controls, compliance policies and procedures related to the FCPA.

In a number of recent cases dating to late 2010, the DOJ has taken the compliance guidelines a step further by also requiring companies to report on a periodic basis on compliance efforts and improvements following settlement. For example, in the Panalpina settlement from November 2010, the DOJ instructed Panalpina to conduct three annual reviews of its anticorruption compliance standards and procedures, and to update its compliance program according to "relevant developments in the field and evolving international and industry standards."

Johnson & Johnson

In the Johnson & Johnson settlement, the DOJ went beyond even those reporting measures in detailing specific compliance expectations to place stringent "enhanced compliance obligations" on the company. For example, Johnson & Johnson must identify at least five operating companies that are high risk for corruption because of their sector and location, and conduct FCPA audits of those operating companies at least every three years.

The list of high-risk operating companies is to be reviewed annually, and updated as necessary. The "enhanced compliance obligations" also list the components that the FCPA audit should include and how it should be conducted. Other notable requirements of the Johnson & Johnson settlement include the corporate departments to be represented on the company's internal audit team; company guidelines for gifts, travel and hospitality policies; due diligence guidelines for acquisitions and third parties; and training requirements.

The DOJ has rarely used this level of detail in past prosecution of FCPA cases, with perhaps the closest precedent being enhanced corporate compliance and reporting obligations in a Sept. 29, 2010, settlement with ABB Ltd., which is uniquely situated due to its previous FCPA settlements with the DOJ.

The specific settlement obligations are particularly noteworthy in this case because of the breadth of the conduct that the DOJ investigated. The investigation stemmed from improper payments to foreign officials made by agents or employees of the company's medical device and pharmaceutical subsidiaries to gain business in Greece, Poland, Romania and under the U.N. Oil For Food Program in Iraq.

This scope of conduct suggests that problems were not necessarily isolated, and appears similar to the type of issues that might ordinarily result in imposition of a compliance monitor by the DOJ. (One could make the same argument about the November 2010 Panalpina settlement, which involved payments to foreign officials in Angola, Azerbaijan, Brazil, Kazakhstan, Nigeria, Russia and Turkmenistan but did not result in the imposition of a compliance monitor).

Compliance Monitors

A review of recent FCPA investigations and prosecutions suggest at least the possibility that the DOJ may be emphasizing heightened direction of internal company efforts to reform compliance, rather than an imposition of an outside monitor.

Throughout much of 2010, the imposition of monitors was relatively frequent, with monitors being imposed in, for example, the Innospec (March), Daimler AG (March), Technip (June), and Universal (August) and Alliance One (August) matters. In contrast, since the Panalpina settlement in November 2010, we have identified only one corporate FCPA settlement resulting in imposition of a compliance monitor: the JGC Corp. settlement from April 2011.

That settlement may be reasonably considered an outlier to the trend of less frequent DOJ use of compliance monitors, as it involved allegations of high-level bribery in a joint venture project between JGC and KBR Inc.; Technip SA; and Snamprogetti Netherlands BV to build a liquified natural gas plant in Bonny Island, Nigeria. All the other partners in that project have previously entered into separate multimillion-dollar FCPA settlements resulting from conduct related to the Bonny Island project.

Conclusion

The extent to which "enhanced compliance obligations" enter into general use as opposed to being reserved for special cases remains to be seen, although it is a trend that bears monitoring. If the trend does continue, there are at least a few initial conclusions that companies may make from it. First, companies may want to consider using the more specific guidelines in the Johnson & Johnson settlement to reevaluate their own compliance procedures.

Second, the new terms stress the importance for companies to have effective compliance programs in place to mitigate any adverse effects if a violation does arise, and may reflect that companies have generally increased compliance efforts due to heightened FCPA enforcement. Third, if it continues, this trend may change the way that companies approach FCPA settlement negotiations with the DOJ.

However, while a trend away from compliance monitors may give companies comfort about the fallout from an FCPA settlement, it would not indicate that the DOJ is taking the compliance obligations of companies any less seriously, as indicated by the large dollar amounts that continue to dominate FCPA settlements.

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