The Ever-Expanding Jurisdiction Of The FCPA

The Editor interviews Richard W. Smith, Co-Chair of Wiley Rein’s Litigation Group, and Gregory M. Williams, Partner in the Litigation Group.

Editor: Would each of you tell our readers about the focus of your practices?

Smith: I am a partner at Wiley Rein LLP and co-chair of the firm’s commercial litigation department. My practice focuses on internal investigations and compliance issues, as well as commercial litigation. I have considerable experience in managing large-scale internal investigations on behalf of multinational corporations in complex matters involving potential overlays of civil and criminal liability.

I have a broad commercial litigation practice, which has included the representation of a domestic pharmaceutical company in defense of a $5 billion antitrust claim, a Japanese chip manufacturer in defense of criminal and civil price-fixing claims involving DRAM and SRAM chips, and several gas pipeline and other energy-related companies in commercial litigation matters.

Williams: I am also a partner at Wiley Rein LLP. My practice focuses on internal investigations and compliance issues, particularly related to the Foreign Corrupt Practices Act (the “FCPA” or the “Act”), as well as complex commercial litigation. My FCPA experience runs the gamut from designing corporate anti-corruption programs, policies and procedures; conducting due diligence in mergers and acquisition settings and on international agents, joint venture partners and other third parties; and managing internal investigations. I counsel a wide variety of clients, including government contractors, franchisors, manufacturers and oil, engineering, private equity, financial services and construction companies, in connection with business transactions worldwide.

I also have a wide-ranging litigation practice on behalf of both plaintiffs and defendants. For example, I defended the NYSE-listed French multinational Alstom SA in a $4 billion class action securities case, which settled for just under $7 million (less than 1 percent of the original claim). I also represented several oil companies in their breach of contract claim against the United States resulting in a $1.8 billion award, the largest-ever such award from the Court of Federal Claims.

Editor: Given the severe penalties, why aren't more corporations challenging FCPA allegations in court?

Williams: To date, there has been little judicial interpretation of FCPA. Companies faced with FCPA allegations settle rather than face the potential financial and reputational harm of unsuccessfully challenging the allegations. This dynamic has allowed the U.S. Department of Justice (the “DOJ”) and the Securities and Exchange Commission (“SEC”), the two agencies with overlapping jurisdiction to enforce the FCPA, to interpret the Act very aggressively without the normal restraining influence exercised by the courts. Those interpretations are announced and, in effect, codified in connection with the settled FCPA actions, for example, in a DOJ criminal information or an SEC cease-and-desist order. There is a possibility the situation may change somewhat as the government pursues charges against more individuals, as individuals have tended to fight such charges in court to a much greater extent than companies have.

Editor: Many are familiar with the eye-popping headlines regarding the cost of FCPA investigations, notably the Wal-Mart matter. Are those outliers, or are they becoming the norm?

Smith: Yes, the Wal-Mart investigation costs, now totaling almost $450 million to date, have captured everyone’s attention. Avon investigative costs have reportedly reached $340 million. Those examples are outliers in the sense that few investigations will reach such stratospheric heights. However, they reflect a deeper reality. The FCPA constitutes the most significant compliance challenge for companies operating internationally. The consequences of a violation are steep. Fines and penalties routinely amount to tens, and even hundreds, of millions of dollars. As Wal-Mart and Avon illustrate, the costs associated with the resolution of an FCPA matter include much more than simply the fines and penalties. Further, the U.S. government is targeting individuals, to a greater extent than ever, with several receiving jail time. Companies and their employees must take very seriously their obligations under the law and take measures to ensure compliance.

Editor: Can you provide examples of the government’s aggressive interpretation of the FCPA?

Smith: There are many, many examples of the government’s expansive interpretation of the provisions of the FCPA. For example, although the FCPA is subject to a five-year statute of limitations, innumerable enforcement actions are based on conduct several years in the past. Similarly, the SEC and DOJ have interpreted their jurisdiction to enforce the Act to extend virtually worldwide. The most tenuous nexus to the United

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States has sufficed, including, for example, an email sent from a person outside the United States to another person outside the United States, but which passed through a U.S. server. Companies that face allegations of improper payments should not expect to resist FCPA charges successfully on the basis of “technical” defenses such as the statute of limitations or lack of jurisdiction.

Williams: Perhaps more challenging is the government’s interpretation of the Act’s knowledge standard. The FCPA prohibits both direct and indirect payments to foreign officials for the purpose of obtaining or retaining business. The prohibition of indirect payments means that a company may face liability based on improper payments made not only by its employees, but by the third parties, such as commercial agents, with which it does business. If such third-party payments benefit the company and are made with the actual knowledge and/or participation of the company, such a prohibition raises few concerns. However, as interpreted and enforced by the DOJ and the SEC, knowledge can be established based on a company’s “conscious disregard” or “willful blindness” of red flags indicating the possibility of third-party payments. Moreover, according to the government, the circumstances constituting a red flag are vast. Simply operating in a country or region that is perceived to present a high level of corruption risk can qualify. In connection with Volvo’s FCPA settlement stemming from the Iraqi Oil-for-Food Programme, the SEC specifically noted that “[a]lthough Volvo knew of endemic corruption problems in the Middle East, it appeared to take on faith, without adequate confirming steps, that its managers and employees were exercising their duties to manage and comply with compliance and control issues.”

Editor: You are co-authors of an article on the Harvard Law School Forum on Corporate Governance and Financial Regulation blog that raises the question of whether we are entering an era of strict parent liability for anti-bribery violations. Can you describe what you mean by the phrase “strict parent liability for anti-bribery violations”?

Smith: Our Harvard piece discusses Alcoa, Inc.’s (“Alcoa’s”) recent FCPA settlement, in which the company paid $384 million in penalties, forfeitures and disgorgement. The settlement includes an explicit discussion of a theory of parent corporate liability that has been implicit in certain other recent settlements as well. The allegedly improper payments underlying the settlement were made by a third-party consultant employed by Alcoa subsidiaries in connection with a series of aluminum supply agreements with Aluminum Bahrain B.S.C. (“Alba”), a majority-government-owned smelter. Although there is no allegation that an Alcoa official participated in, or knew of, the improper payments made by its far-flung subsidiaries’ agent, the government held the parent corporation liable for FCPA anti-bribery violations under purported “agency” principles.

Williams: The factors that the government relied on in determining that the subsidiaries were the agents of the parent corporation were very general, such as Alcoa appointed the majority of seats on a Strategic Council that provided “direction and counsel” to the subsidiaries and Alcoa set the business and financial goals for the subsidiaries and coordinated their legal, audit and compliance functions. This is a significant development. Parent liability under the anti-bribery provisions has traditionally been premised on the parent company’s authorization, direction or control of the alleged improper conduct.

Editor: What measures do you recommend a company take in light of the aggressive enforcement stance of the DOJ and SEC with respect to payments by third parties and subsidiaries?

Williams: The central lesson is that a company must adopt an effective anti-corruption compliance program that extends to third parties and throughout the corporate structure. The DOJ and SEC provided guidance regarding the components of an effective program in the jointly published Resource Guide to the U.S. Foreign Corrupt Practices Act (“Resource Guide”). They include commitment from senior management to compliance; written compliance policies and procedures and training regarding those policies and procedures; oversight of the program by a senior executive with authority, autonomy and adequate resources; disciplinary measures for those who violate policy and other appropriate remedial steps; procedures to assess and monitor third parties that might pose corruption risk; confidential reporting of suspected violations; and investigation of suspected misconduct.

Editor: Compliance is often regarded as overly costly and burdensome. How do companies balance cost concerns and compliance needs?

Smith: Companies hire counsel to assist them in managing risk, not to turn their businesses over to their exclusive control. There is no doubt that the real and opportunity costs of adopting anti-bribery compliance measures — if not handled properly — can be steep. Counsel need to understand all this as they establish compliance programs and implement anti-corruption policies.

Of course, there are a wide variety of reasons that a company should take compliance seriously, not the least of which are the potential financial penalties the company may face for an FCPA violation. To balance these competing needs, companies should adopt a risk-based approach to identify the activities that represent most significant potential FCPA exposure. There are a number of factors relevant to such a determination, including

- the level of corruption in the country or region;
- the level of interaction the company, its subsidiary or affiliated third parties (including agents and joint venture partners) have with “foreign officials” (including employees of state-owned entities);
- the volume of business involved in such arrangements; and
- possible ties between affiliated third parties and foreign officials.

Williams: Based on such factors, different companies will face different risk profiles. A company that employs agents paid on commission to sell goods or services directly to the government will need to devote substantial resources to up-front due diligence on those agents to ensure that they are being employed for a legitimate business purpose (not simply as a conduit for improper payments) and otherwise do not pose a substantial corruption risk. Conversely, a retail franchisor with international operations will have different needs. In such circumstances, there will rarely, if ever, be a risk that a franchisee has been selected as a mere conduit for improper payments. However, the franchisees may very well have to seek a variety of governmental licenses or approvals, for example, customs clearance or zoning rulings. Accordingly, the franchisor will likely need to conduct as substantial up-front anti-corruption due diligence on its franchisees but would be well advised to perform periodic FCPA reviews of the operations of its franchisees in the regions posing the most substantial corruption risk.

Smith: A risk-based, cost-effective compliance program will not only help a company detect and deter improper conduct, it can aid the company in rebutting an assertion of constructive knowledge if improper payments are made by a subsidiary or third party.