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Focus

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FEATURE COMMENT: House Subcommittee Debates FCPA Amendments

The House Judiciary Subcommittee on Crime, Terrorism and Homeland Security held a hearing June 14 on the Foreign Corrupt Practices Act before a nearly full room. The hearing was held at the request of Judiciary Committee chair Lamar Smith (R-Tex.) to explore whether the FCPA needs to be revised. However, it became clear from the outset that both Subcommittee chair James Sensenbrenner (R-Wis.) and ranking member Bobby Scott (D-Va.) were focused not on whether the law needs to be changed, but on which changes should be made.

The changes discussed at the hearing were presented in a position paper submitted to the committee in October by the U.S. Chamber Institute of Legal Reform, an affiliate of the U.S. Chamber of Commerce. The paper advocated several changes to the FCPA, including the addition of an affirmative defense for companies with robust compliance programs, clarification of the term "foreign official," limitation of successor liability, limitation of a parent company's liability for subsidiaries, adding a willfulness requirement for corporate liability, and improving the procedures for guidance from the Department of Justice.

Testifying before the committee on behalf of the Government was Deputy Assistant Attorney General Greg Andres. Former U.S. attorney general and federal judge Michael Mukasey, currently a partner at Debevoise and Plimpton, testified for the U.S. Chamber Institute of Legal Reform. Former Deputy Attorney General George Terwilliger, currently of White & Case, and Shana-Tara Regon, director of white collar crime policy for the National Association of Criminal Defense Lawyers, also testified. In addition, two organizations, Global Witness and Global Financial Integrity, submitted written testimony.

The proposed changes come after successive years of renewed DOJ focus on FCPA enforcement. Some of the proposed changes are closely tied to positions that have figured prominently in recent cases brought by DOJ in the course of that increased enforcement. For instance, multiple recent prosecutions have involved alleged bribery of employees of state-owned companies on the basis that they are "foreign officials" for purposes of the FCPA. Defendants in these cases have challenged this application of the law, but thus far have been unsuccessful.

Addition of Compliance Defense—The proposed addition of a "compliance defense" was one of the most exhaustively discussed proposals. Such a change would provide an affirmative defense to companies that have been alleged to have violated the FCPA, but have a robust compliance program in place for training, preventing and identifying FCPA violations. Both Mukasey and Terwilliger supported this proposal. Mukasey likened the proposed change to the system in employment-discrimination cases, under which companies with antidiscrimination policies and a means for victims to obtain redress can escape liability. Such a change to the FCPA, it is argued, would encourage companies to develop more robust compliance programs.

In opposing this proposal, Andres noted that a robust compliance program can already work in a company's favor when prosecutors decide whether to bring criminal charges. Moreover, if criminal charges are brought and a company pleads guilty or is convicted, a robust compliance program may help it to obtain more favorable treatment at sentencing. Though advisory, the Federal Sentencing Guidelines provide for a three-point reduction in the culpability score for companies with effective ethics and compliance programs. Notably, Assistant

Attorney General Lanny Breuer has previously made public statements rejecting the notion of adding a compliance defense to the FCPA.

Such a provision would not be without precedent. In the UK, the recently enacted Bribery Act, which takes effect July 1, provides an affirmative defense to corporate liability for companies that have enacted "adequate procedures" to comply with the law. A key challenge presented by the Bribery Act's affirmative defense is clear: How does a company formulate and implement "adequate procedures"? The UK Ministry of Justice published guidelines setting forth the parameters of what adequate procedures for companies look like. However, producing that guidance was a long and contentious process, and the guidance continues to draw criticism, including that it lacks sufficient clarity. In addition, the availability of this affirmative defense under UK law comes at a price: unless the affirmative defense can be established, the law expressly provides for strict liability for companies for the acts of their agents.

Redefinition of "Foreign Official"—Another focus of the hearing was the proposed clarification of the term "foreign official" in the FCPA. Among the FCPA's prohibitions, of course, is the corrupt provision of something of value to a foreign official to obtain or retain business. See, e.g., 15 USCA § 78dd-1. The FCPA defines "foreign official" as

> any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

DOJ has sought to push the boundaries of this definition in a number of prosecutions, most recently in *U.S. v. Aguilar*, 2011 WL 1792564 (C.D. Cal. 2011) and *U.S. v. Carson*, No. 09-CR-0077 (C.D. Cal. May 18, 2011). In those cases, the bribe recipients were officers of state-owned corporations, not "government employees" in the traditional sense. Concerned companies and individuals—including the defendants in the cases—have argued that Congress intended a narrower interpretation in enacting the law, and that the law does not provide adequate notice that such conduct is prohibited. However, as the Government pointed out in its briefing in *Aguilar*, state-owned corporations are in many respects instrumentalities of the state. Moreover, the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, to which the U.S. is a signatory, defines foreign public official to include employees and agents of a "public enterprise." The definition urged by the Government (and ultimately adopted by the court) in *Aguilar* and *Carson* conforms with the definition of foreign official used by the OECD Convention and certain OECD member countries.

At the hearing, the private-sector witnesses generally agreed that a clear definition of "foreign official"—however it ultimately is defined—would help corporations to train employees and ensure an appropriate level of scrutiny with regard to relationships and activities with foreign persons covered by the FCPA. As DOJ's representative, Andres objected to attempts to narrow the definition, noting that any change may over-include officials in some parts of the world while under-including officials in other parts because of the wide variety of government structures across the globe.

Creation of Corporate Willfulness Requirement—The FCPA, like other U.S. criminal laws, applies to corporations through their employees. Corporations cannot act on their own and have no mental state except through their employees. A corporation can be held criminally liable if an employee, acting within the scope of his or her employment, commits a crime.

At the hearing, Mukasey advocated for a change proposed by the U.S. Chamber that a corporate "willfulness" requirement be added to the FCPA for corporate criminal liability. With this change, liability of a corporation would require, as a condition precedent, liability of an individual employee "for whom the corporation is liable." Such a change, it was argued, would prevent companies from being held liable and facing significant penalties based on a mere showing of "willful ignorance" imputed to the company by the bad acts of a handful of employees. It would also prevent corporate parents from being liable for acts of their subsidiaries of which they were unaware. Andres countered that DOJ does not prosecute corporations for the actions of rogue employees and that the proposed change

would therefore be unnecessary. Terwilliger also noted that it would be difficult to craft a willfulness requirement for a corporation because a corporation is not a person.

It is unclear how such a proposed change would work in practice. There is little distinction in U.S. criminal jurisprudence between "willfulness of the corporation" and willfulness of an agent or employee of the corporation. Some jurisdictions, such as the UK, generally require as a condition of corporate criminal liability that an individual who is a "directing mind and will" of the company also be liable. Typically such individuals are directors or senior corporate officers. This doctrine, however, is not prevalent in the U.S.

This proposed change would also create other issues. There have been a number of negotiated corporate-only resolutions under the FCPA. In fact, companies facing investigations often may view a corporate-only plea as a favorable outcome because it might permit individuals to avoid jail time and it represents a final resolution of the matter for the company.

Limiting Successor Liability—Under current DOJ policy, an acquiring company is liable for FCPA violations of companies it acquires regardless of whether the acquiring company had knowledge of or a role in the violation. In fact, acquiring companies rarely have such knowledge or role. Both Mukasey and Terwilliger proposed limitations on such successor liability. Mukasey proposed a total bar on pure successor liability, such as where the acts constituting violations occurred entirely before the merger and without involvement of the acquiring company. Terwilliger proposed a more moderate approach: to establish a "period of repose" during which an acquiring company can conduct post-acquisition due diligence and voluntarily disclose violations by the acquired company. Reps. John Conyers (D-Mich.) and Hank Johnson (D-Ga.) expressed skepticism that such reforms were necessary.

Advisory Guidance Reforms—Under the FCPA, a party can request an advisory opinion from DOJ on whether certain actions are permissible. These opinions lack precedential value, however, and often take a long time to obtain. Mukasey criticized these features of the advisory guidance program. He also cited figures suggesting that the program is highly underutilized: since it was implemented in 1988, just 33 opinions—an average of 1.8 per year—have been issued. Furthermore, although the 1988 FCPA amendments directed DOJ to evaluate whether it should issue guidelines to facilitate compliance, in 1990 DOJ declined to issue such guidelines. It has not reconsidered this decision. Mukasey urged DOJ to implement an active advisory opinion process and issue robust guidelines to assist companies in complying with the FCPA.

General Concern about Reach of FCPA—Finally, although Regon did not take a position on any specific proposed amendments, she stressed the problems, often cited by members of the defense bar, caused by the perceived lack of clarity in the FCPA. She voiced the concern that prosecutors wield too much discretion because of expansive definitions of "foreign official" and "instrumentality" and the limitless "anything of value" standard. She contended that the law would have a greater deterrent effect if the statute were clearer. Regon expressed concern that the law as currently written grants DOJ nearly unbridled power to prosecute almost any company doing business overseas.

These comments prompted spirited questioning by Conyers. He pressed Regon for an example of a prosecution involving de minimis "things of value" (referred to at the hearing as "cup of coffee" cases) or other cases suggestive of over-criminalization. She did not provide one.

However, concern among industry and the defense bar about the boundaries of DOJ's FCPA enforcement powers are unlikely to abate soon. Indeed, DOJ was recently rebuked in its effort to prosecute certain activity under the FCPA. In one of the cases arising from the high-profile "Shot Show" sting in 2010, the trial judge granted a partial directed verdict of acquittal to a defendant whose conduct occurred entirely outside of the U.S.

Conclusion—In light of committee members' questions, it appears that legislation will be introduced to amend the FCPA. Indeed, at the conclusion of the hearing, Sensenbrenner admonished Andres to "get on board and tell the attorney general," driving home the message that amendments would be forthcoming.

What remains to be seen is when amendments will be introduced and what any proposed amendments will seek to change. While amendment was more heavily favored by Republicans on the committee, some Democrats also favored amendment.

Even Conyers, the committee's most vocal opponent to amending the FCPA, noted that he might support the addition of a compliance defense and language clarifying "foreign official."

Other suggested changes, such as adding a corporate willfulness requirement and limiting liability of corporate successors, are likely to face more opposition. Democratic representatives in particular expressed resistance to changes that they viewed as providing a "free pass" to corporations.

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This Feature Comment was written for The Government Contractor by* Joshua Hochberg, Jason Silverman *and* Kevin Barnett*, attorneys in the Washington, D.C. office of McKenna Long and Aldridge LLP.