wiley

NEWSLETTER

FCPA Year In Review

February 2017

Government Contracts Issue Update

2016 was an eventful year for Foreign Corrupt Practices Act (FCPA) enforcement, with over $2 billion in corporate fines and multiple individual prosecutions. 2016, moreover, was followed by a record-breaking January 2017, as the Obama Administration drew to a close.

In April 2016, the U.S. Department of Justice (DOJ) introduced a one-year FCPA pilot program. Under the program, which is designed to encourage self-reporting, cooperation (including identifying individuals responsible for alleged misconduct), and remediation, a company that undertakes such measures may be eligible for declination or up to a 50% reduction off the bottom of the applicable Sentencing Guidelines fine range. Even if entitled to such credit, a company that is determined to have violated the FCPA is required to disgorge the gains from its misconduct.

International anti-corruption cooperation also deepened, with several cross-border enforcement actions resulting in hundreds of millions and even billions of dollars in combined penalties.

The DOJ and the U.S. Securities Exchange Commission (SEC) continued to advance aggressive enforcement stances, for example, holding parent companies liable for the actions of their subsidiaries on an agency theory despite the absence of an allegation that the parent knew of, or participated in, the allegedly improper payments.

We believe that these annual updates are useful snapshots for compliance professionals and practitioners. But we would like to add a caution. A great deal of the FCPA commentary focuses on metrics and the ebbs and flows of enforcement activity based on the latest 6-

Practice Areas

FCPA and Anti-Corruption

Government Contracts

White Collar Defense & Government Investigations

or 12-month period. Although these data are informative (at least for FCPA junkies), they should not mask the more fundamental points that the last 15 years or so have demonstrated. The FCPA is, and likely will remain, an enforcement priority. U.S. officials continue to interpret the statute and their jurisdiction expansively. And the consequences of non-compliance — financial and otherwise — can be enormous.

At this stage, for U.S. companies doing business abroad and for international companies potentially subject to U.S. jurisdiction, anti-bribery measures should constitute a critical component of compliance policies, procedures, and practices and of corporate culture more generally.

The relevant question should be how to balance the potential exposure and the sometimes substantial resources required for compliance, i.e., how to assess risk appropriately, how to direct time and energy at those activities that present the greatest concern, and when to use outside counsel or forensic accountants, which provide important expertise and an independent voice, but can be costly.

Despite some commentary to the contrary, we believe it would be misguided to conclude that the incoming Trump Administration changes that calculus, at least at this stage. First, it is too soon to determine exactly what the Trump Administration's priorities will be. Second, FCPA violations and serious investigations have long life-spans, creating exposure for a significantly greater period than four years. Thus, although the advent of the new administration clearly has relevance to FCPA enforcement, it would be short-sighted to curtail anti-corruption compliance measures dramatically.

Click here to read more here.