



United States

## Upping the ante on FCPA enforcement

By Lisa Roner, North America editor

### Enforcing the Foreign Corrupt Practices Act is becoming a major undertaking

Enforcement of the US Foreign Corrupt Practices Act is escalating. Bribery is a growing threat for companies doing business overseas and, as the international business law firm Fenwick & West says, it is being talked about as the “corporate crime of the century”.

Actions brought by the US Department of Justice and the Securities and Exchange Commission, the market regulator, doubled from 2006 to 2007. Public companies have disclosed more than 50 pending investigations. And Fenwick expects FCPA enforcement to continue to rise throughout 2008 – the firm says high ranking DOJ officials have called current enforcement actions “the tip of the iceberg”.

That sentiment seems to be reflected in the recent increase in “feet on the street” to address FCPA enforcement. According to accountants KPMG, the DOJ has recently dedicated several prosecutors to FCPA full time and the Federal Bureau of Investigation has assigned four agents to work on FCPA cases exclusively. The SEC is also reportedly stepping up its efforts by allowing FCPA violations to be worked on from its branch offices in addition to its Washington headquarters.

#### No immunity

Kevin LaCroix is an attorney and the director of OakBridge, an insurance intermediary providing executive liability coverage. He suggests high profile enforcement actions at oil services firm Baker Hughes, which agreed to a \$44 million settlement – the largest combination of fines and penalties ever imposed in a FCPA case, and German engineering giant Siemens, will only fuel the FCPA investigation

fire. The “sheer scope and magnitude of the concerns” in those cases, he says, “suggest a larger problem that inevitably will attract increased prosecutorial interest and involve more companies”.

When the FCPA was originally enacted in 1977, it was tailored to address bribery of foreign officials by oil and gas companies for access to natural resources. Today, the DOJ and SEC are known for launching investigations of whole industries. According to law firm Sidley Austin, industry-specific investigations allow regulators to better leverage their resources as they identify potential patterns of behaviour and common actors.

High on their list of late have been the sales and marketing tactics of European medical device makers, companies participating in the UN oil-for-food programme in Iraq and, according to Fenwick, a continued focus on technology companies operating in high risk areas, such as Asia and Central and South America.

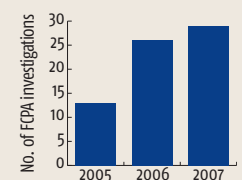
Mike Koehler, senior counsel at Foley & Lardner, says no industry is immune from the FCPA statute, and business activity in all countries will be subject to scrutiny. Last year’s activity saw actions in a broad range of industries, including telecommunications, software, chemicals and agriculture.

Most litigators agree that another trend is signalled by Lucent Technologies’ recent \$2.5 million FCPA settlement with the DOJ and SEC. It is the first enforcement action since 1999 to focus primarily on travel and entertainment practices. The SEC alleged that Lucent spent more than \$10 million paying for Chinese government officials to travel to the US and elsewhere for sightseeing and entertainment.

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#### New FCPA investigations



Currently, 82 corporations have open FCPA investigations with the DOJ and SEC. Those 82 are the total unresolved investigations – the 50 disclosed in recent SEC filings, plus some from previous years.

**“The only way to deter bribery is to convict individuals”**

– David Freese, FBI



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An O'Melveny & Myers client memo concludes that, particularly when viewed alongside the DOJ's two recent opinion releases on this subject, the Lucent action "sends a clear signal that US enforcement authorities have a keen interest in this area".

In another recent trend in FCPA enforcement, the DOJ and SEC are pursuing and penalising not only companies, but also the individuals responsible for violations.

Mark Mendelsohn, who is responsible for FCPA enforcement at the DOJ, told attendees at a recent American Bar Association event that the trend in individual enforcement was "part of a very concerted effort" to "deter the conduct" of individuals. And Donald Freese, chief of the FBI's FCPA unit, has said the only way to deter FCPA conduct is to convict individuals.

Law firm Shearman & Sterling says: "While the FCPA enforcement landscape is constantly evolving, all signs continue to point to a heightened degree of scrutiny and graver consequences for FCPA violators in the future." Clearly companies in every sector, regardless of where they operate, should be reassessing their compliance programmes and preparing for the increased scrutiny of an FCPA crackdown. ■

### Action against individuals

- Since 1990, the DOJ has brought more than twice as many prosecutions against individuals as it has against corporations.
- In 2006, the DOJ brought actions against four individuals.
- In 2007, the DOJ brought actions against ten individuals.

Source: Shearman & Sterling LLP

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