

Don't Expect Much From DOJ's New FCPA Guidance

Law360, New York (January 25, 2012, 12:56 PM ET) -- After the last few years of extremely aggressive U.S. Department of Justice prosecutions under the Foreign Corrupt Practices Act, white collar practitioners and the business community generally can be forgiven if they saw a ray of hope in the recent comments of Lanny Breuer, head of the DOJ's criminal division. Breuer, speaking at a November 2011 FCPA conference in Washington, D.C., announced that in 2012, the DOJ would be releasing "detailed new guidance" on criminal and civil FCPA enforcement. The chairman of the conference characterized Breuer's announcement as a "big step" that was "pretty significant."

Breuer's announcement created an initial buzz of excitement. After all, the U.S. Chamber of Commerce had recently proposed amendments to clarify and limit the FCPA, and congressional hearings had been held in 2010 and 2011. And earlier in 2011, the United Kingdom had released its own formal guidance regarding the U.K.'s new Bribery Act 2010, which contains foreign bribery provisions similar to the FCPA.

The U.K.'s guidance was quite extraordinary: Following six months of public comment and debate, the guidance was 43 pages long, contained six guiding principles and 11 case studies, and was accompanied by a seven-page "Quick Start Guide" and a 12-page brochure on prosecution guidance.

Having heard Breuer's announcement, practitioners and businessmen understandably wondered: Would the DOJ's new guidance be similar to the U.K. guidance? Would there be a procedure for providing public input into the new guidance? Would the DOJ soften its earlier aggressive positions, or seriously entertain some of the Chamber of Commerce's proposals? Should businesses await the DOJ's new guidance before pouring additional resources into their FCPA-compliance programs?

Unfortunately, in retrospect, we should not expect very much from the DOJ's upcoming new guidance. What Breuer meant by the word "guidance" is almost certainly different from the U.K.'s guidance, and the DOJ is unlikely to modify its aggressive FCPA stance.

It turns out that the DOJ thinks of itself as having already provided FCPA guidance. The website for the DOJ's Fraud Section currently contains a six-page brochure with a general description of the FCPA. That brochure is commonly referred to as the "Layperson's Guide to the FCPA." Although nobody thinks of the "Layperson's Guide" as providing meaningful guidance to businesses or FCPA practitioners, the guide refers to itself as "guidance."

Thus, when Breuer referred to the DOJ's upcoming "new guidance," he did not mean that the DOJ was going to generate some first-time, U.K.-like formal guidance. He meant simply that DOJ is updating and further developing the guidance available now in the "Layperson's Guide," and seeking to integrate that guidance with other FCPA resources available in the DOJ Manual and the Criminal Resources Manual. That's why the guidance will be "new."

Although the U.K.'s formal guidance was preceded by six months of public comment, there is no reason to be expect such public input on the DOJ's new guidance. That has never been the DOJ's practice, and that practice is not likely to change now.

For one thing, the FCPA has been around for 35 years, whereas the U.K. Bribery Act was just implemented in 2011. For another thing, the U.K. Bribery Act contained a new and cutting-edge "adequate procedures" defense where formal guidance was thought necessary. More pragmatically, the DOJ is already aware of the business community's views of the FCPA as a result of the Chamber of Commerce's recent proposals. Finally, Breuer suggested that the work on DOJ's new guidance has already begun, so further input from the business community or FCPA practitioners is simply not in the cards.

More importantly, Breuer's announcement does not suggest any new, conciliatory attitude toward FCPA enforcement. Breuer specifically said, "We have no intention whatsoever of supporting reforms whose aim is to weaken the FCPA and make it a less effective tool for fighting foreign bribery." He also addressed one of the Chamber of Commerce's specific proposals, stating that "watering down the Act — by eliminating successor liability in the FCPA context, for example — would send entirely the wrong message."

So, what can the business community or FCPA practitioners reasonably expect from the DOJ's upcoming FCPA guidance? Not much. Breuer promised that the new guidance would be "detailed" and would hopefully be a "useful and transparent aid." However, it is easy for new guidance to appear "detailed" or "useful" when the point of comparison is the earlier six-page "Layperson's Guide." The real tests will be: How detailed? How useful? How transparent?

On that score, the DOJ is in a difficult position. Historically, the DOJ has taken the view that the FCPA's provisions are clear and that the DOJ's aggressive enforcement policies are justified and necessary. Indeed, the DOJ already provides a fairly unusual opinion procedure whereby companies can seek DOJ guidance about whether their contemplated actions may violate the FCPA, and the DOJ's responsive opinions are then released for public consideration. (The DOJ Fraud Section website refers to this procedure as another form of DOJ "guidance" regarding the FCPA, but the procedure is used only about twice per year, on average.)

Furthermore, the DOJ's views have largely gone unchallenged in court because few cases have resulted in appellate decisions, and because business clients making a risk-reward analysis have strongly favored pre-indictment dispositions, frequently by deferred prosecution or nonprosecution agreements.

That background suggests that the new FCPA guidance is unlikely to be particularly meaningful. Yes, we can expect the new guidance to be somewhat more detailed, but that detail will likely express the DOJ's perspective; it is not likely to reflect a balanced or business-oriented view of the competing interests. More to the point, the new guidance is not likely to be earth-shaking or even to reveal any significant changes or insights into FCPA policy.

Hopefully, the details of the new guidance will nonetheless be somewhat helpful to the business community and FCPA practitioners going forward. On that point, we'll just have to wait and see.

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