The Metropolitan
Corporate Counsel®

www.metrocorpcounsel.com

January 2013 Volume 21, No. 1

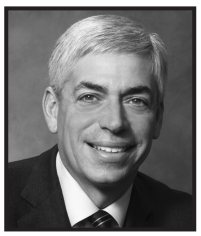
Former Federal Prosecutors Pen New Treatise On The FCPA

The Editor interviews ***Martin J. Weinstein****,* ***Robert J. Meyer*** *and* ***Jeffrey D. Clark****, Partners in Willkie Farr's Litigation Department and authors of* The Foreign Corrupt Practices Act: Compliance, Investigations and Enforcement.

Editor: What prompted the three of you to write your book, ***The Foreign Corrupt Practices Act: Compliance, Investigations and Enforcement*****? How does it differ from other treatments of the subject?**

Weinstein: The three of us have been practicing law together in this area for two decades or so. As former federal prosecutors, we've seen the enforcement climate regarding the Foreign Corrupt Practices Act increase very steadily through the years, and, while there have been some treatises written in the field, we felt there was a need for a contemporary volume dealing with all aspects of the law that would be user-friendly for both in-house practitioners and outside counsel. We wanted to offer clear analyses as well as exhibits and other helpful information for a reader to apply in his or her day-to-day practice. We'd like to believe we have brought some value to the discussion and produced a book that will be of substantive assistance.

Meyer: We hoped to cover the topic more completely than any other treatise on the market, so to that end we go into the legislation itself, its history, the meaning of the various terms within the legislation, etc. Furthermore, while most authors have focused on potential liability for U.S. issuers and U.S. corporations, we wanted to broaden the discussion to include other topics, including issues related to non-U.S. companies, for example, and potential liability of individuals. Our book addresses not only compliance – which we discuss in multiple chapters covering everything from the basics on facilitation payments to third-party relationships to investment transactions – but also investigations. We discuss how best to conduct a proper internal investigation of an FCPA matter and what to expect during a U.S. government enforcement matter or a multilateral enforcement action.



Martin J. Weinstein

Robert J. Meyer

Jeffrey D. Clark

Clark: We also thought we could add to what was on the market by creating easy-to-use forms and samples that would be a very practical resource for practitioners who may not handle these kinds of matters day in and day out. A series of 25 or 30 appendices comprises best practices forms ranging from due diligence questionnaires to sample policies to contractual representations and warranties. A practitioner can use any one of them as a starting point and then tailor it to the situation at hand. The book is intended to be both thorough and scholarly in many respects and also very, very practical.

Editor: Have the SEC and DOJ recently released Guide to the FCPA affected your book's publication?

Meyer: Our book was completed well before the DOJ published its Guide. So, when the Guide came out, we decided to include with this first issue a "practitioners alert" at the beginning of the book to reflect and analyze this latest development. This alert analyzes the DOJ/SEC FCPA Guide and gives the reader insight into what DOJ's compliance and enforcement policies are; what this Guide should indicate regarding compliance; and what DOJ's expectations are.

Clark: We should add here that the DOJ/SEC FCPA Guide doesn't really break any new ground. Effectively what it does is pull together preexisting positions that both DOJ and the SEC have taken on a variety of topics, including the definition of a "foreign official" and the jurisdictional reach of the FCPA. Many of the issues covered by the Guide are still open to debate and challenge. The Guide doesn't really alter the positions that the DOJ or the SEC have taken on any substantive issues.

Editor: Please discuss the extent and reach of the FCPA antibribery provisions. Who qualifies as a "foreign official," and how is "agency" defined?

Weinstein: The jurisdiction of the statute is extremely broad; it's one of the few U.S. statutes that can apply both to corporations and individuals here in the U.S. and also anywhere else in the world. The issue of who qualifies as a foreign official has been widely debated; the question wasn't particularly on people's minds in 1977 when the statute was enacted

Please email the interviewees at mweinstein@willkie.com, rmeyer@willkie.com or jdclark@willkie.com with questions about this interview.

because at that time companies were primarily focusing on western European governments and a few Asian countries, where the demarcation between the private and public sector was pretty clear. Economies have evolved since then. As you know, some of the major energy companies in the world are state-owned; other sectors also have a large number of state-owned players. We address this in great detail in the book because it is a relatively unsettled area of law. Similarly, who functions as an agent – or who can bind a company other than the company's employees – is an extremely important issue that is likewise covered in the book.

Editor: How have the courts defined "criminal intent" thus far? Does it apply to corporations?

Meyer: When thinking about intent under the FCPA, you must consider the various ways in which it can be enforced: there are two general sets of provisions – antibribery and accounting. Under the antibribery provisions, criminal intent really is no different from general intent standards in any federal criminal law. The government must show that a covered person has given something of value to a foreign official with the intent to influence that official or to induce the official to misuse his or her position – this mirrors the intent requirement under the federal domestic bribery statute. The FCPA – as most people know, and as practitioners in this area certainly know – also has a specific provision regarding "willful blindness" or "deliberate ignorance." Although willful blindness can satisfy the intent requirement for other criminal laws, the FCPA takes it a step further by expressly making a party potentially liable for making payments to any third party while consciously disregarding a risk that the third party may pass on some or all of a payment or thing of value to a foreign official. So, under the FCPA, a company or person can be held liable for the acts of an independent contractor, which is somewhat broader than general principles of criminal responsibility, where your liability is limited to acts of an agent under common law principles of *respondeat superior.*

Editor: How have the agencies used the Act's accounting provisions to get around jurisdictional limits? Please discuss required recordkeeping and internal accounting controls.

Clark: The accounting provisions can be and have been used as a powerful enforcement tool. Under the FCPA, the books and records of any controlled subsidiary – that is, a subsidiary that is majority-owned – are considered to be the books and records of the parent company. So, if a non-U.S. subsidiary pays a bribe outside the United States – even if that bribe has no connection to the United States and the parent company and its agents had no knowledge of the bribe – if it is falsely recorded in the books and records of the subsidiary, it is, in effect, a false book or record of the parent company and within the jurisdictional reach of the FCPA's accounting provisions. For many years the government has used the accounting provisions to bring enforcement actions related to conduct that otherwise occurs by non-U.S. persons or entities entirely outside of the United States.

Editor: How may contractual safeguards and due diligence be used to protect a U.S. company from liability when developing a third-party relationship with a foreign entity?

Weinstein: We spend a lot of time on this issue. First, we must remember that the FCPA is primarily an intent-based law. If one conducts a thorough due diligence and engages in a good faith exploration of who one's business partner is – if one does everything one can to protect oneself from the business partner or the agent acting improperly – then in our view, it's a very significant defense to any potential charge if the agent or business partner then commits improper acts. In this day and age, efficient, cost-effective, and risk-based due diligence is essential to any thriving corporate compliance program. Third-party actions account for between 60 and 70 percent of the cases we've been involved with, so if you have a strong third-party process with solid due diligence, contractual provisions, and monitoring, you're going a long way toward managing your potential FCPA exposure. That can be extremely valuable in terms of cost savings and reputation.

Editor: Do you advise your clients to self-report?

Weinstein: We are very cautious about self-reporting to the government. We certainly sometimes advise companies to self-report, but in general we believe that most companies can handle their compliance problems properly without disclosure or government involvement and can appropriately remediate compliance issues and be prepared to respond should the government ever inquire. Companies across industries fix compliance problems – for instance, in a target company that they are acquiring or have just acquired – every day, without the assistance of the U.S. government. This is good all around: it allows the acquiring company to proceed with the acquisition, raises the standard of compliance in the acquired company, and permits the government to deploy its enforcement resources where they are needed most. Our book clearly sets forth how to proceed down such a path. That said, the book also discusses the kinds of circumstances in which self-disclosure may be necessary or advisable and helps readers navigate through that fact-specific, critical strategic decision.

Editor: While the FCPA states that an effective compliance program is not an affirmative defense for noncompliance, it nonetheless lists elements it looks for in a company's compliance program. Would you share those with our readers?

Meyer: The recent SEC/DOJ Guide gives a very thorough description of the DOJ's and SEC's views regarding what constitutes an effective compliance program. They list a number of factors, none of which would be surprising to a practitioner – after all, the elements of an effective compliance program have been the subject of much discussion, including in the U.S. Sentencing Guidelines and in DOJ and SEC FCPA settlements, among other places. So, although the Guide does not break new ground, it does describe in one place all the various components that the DOJ and the SEC look for in a company's compliance program to determine its effectiveness.

For example, the commitment from senior management to the compliance program – often referred to in the com-

mentary as "tone at the top" – is essential. A clearly articulated policy against corruption is another one of the hallmarks. Likewise, having a code of conduct and compliance policies and procedures is a key element of a compliance program. Merely telling your employees not to break the law isn't enough; you must communicate to your employees what that means they should do in their day-to-day duties and articulate clear procedures for them to follow.

The DOJ and the SEC also refer to having proper oversight, autonomy and resources devoted to the compliance program. They recognize that compliance programs can't be one-size-fits-all. Rather, each company should do a risk assessment to understand where its anticorruption risks lie and focus its resources on those areas. A company's compliance program has to include training and communication of the company's policies and procedures. The company's commitment to compliance should be reflected in its employee incentives and disciplinary measures. And a compliance program should reflect appropriate policies and procedures regarding the retention of third parties and the due diligence, contracting, and payment practices related to third parties. It should include policies and procedures to assess and address FCPA risks in mergers and acquisitions or investment transactions. A company should have a confidential reporting mechanism and protocols for conducting internal investigations.

Finally, a compliance program can't be created and then left alone; it should change and evolve over time. Companies should periodically reassess their compliance programs in light of new risks, changes to the business, and changes in the compliance and enforcement landscape and should adapt their programs accordingly.

Editor: In what cases would you advise a client company to utilize DOJ's FCPA Opinion Procedure?

Clark: Although the DOJ would like for its Opinion Procedure Release process to be used more widely, in reality, its utility is limited. Effectively, it is a stop of last resort. Typically, only when a company is otherwise going to walk away from a transaction will it seek an opinion from the DOJ. Most companies are reluctant to take a close compliance question and put it before a group of prosecutors. After all, if those prosecutors can't assure you that they're not going to bring an enforcement action, you are left with a choice of abandoning the transaction or facing an investigation and potential prosecution. Or the DOJ may condition a no-action determination on so many restrictions or modifications that the transaction becomes unpalatable commercially. There are other ways for a company to assess and get comfortable with the FCPA risks of a particular transaction, such as a legal opinion by experienced FCPA counsel. Our book details the nuts and bolts of the Opinion Procedure – how it works, how to use it, etc. – but more importantly it offers guidance on the thought process involved in determining whether the Opinion Procedure process is the best course available.

Editor: In light of the Act's successor liability, how can an acquirer be assured that it has conducted adequate due diligence before acquiring a foreign entity?

Weinstein: This is an important issue, and we believe our book provides a thorough road map to this process. Mergers and acquisitions can carry significant FCPA risks, but we must remember that an acquisition due diligence is not an investigation. The goal is for a company to reasonably assure itself that the target is doing business in a way consistent with its own business practices. This is important not only from an FCPA compliance standpoint but also from the standpoint of safeguarding and maximizing shareholder value. For example, you wouldn't want to buy a company only to discover later that 50 percent of its revenues were tainted by improper conduct; shareholders will get upset that the company paid twice what the target business was worth. On the very day the deal closes, the target company's wrongdoing becomes the acquirer's wrongdoing; the target's tainted revenue becomes the acquirer's tainted revenue. If possible, it's best to fix things before closing, but the government does allow you a brief practical leeway period to remediate problems if you do so promptly after closing.

From a political perspective, the U.S. wants companies that have problems or poor compliance programs to be acquired by companies that *do* have good compliance programs. Readers shouldn't think that a company with compliance issues is radioactive. Our country's public policy should encourage companies with strong compliance programs to acquire companies that have problems because that raises the overall level of compliance for everybody. We don't want to leave problem companies to be acquired by businesses that don't care about compliance – that would be antithetical to the ultimate goal of bringing positive anticorruption measures to countries and businesses around the globe.

Meyer: It bears noting that no matter how much due diligence you do, there is no such thing as absolution when it comes to another company's liability. If Company X has committed a crime prior to the merger or acquisition and Company X continues in existence after the acquisition, Company X is still liable for the commission of that crime. Moreover, if Company X committed a crime prior to the merger, and if Company X dissolves and becomes part of your company, then you are liable. You've succeeded to that criminal liability, and no amount of due diligence will wipe that crime off the slate. However, a company can protect itself from making a bad acquisition by conducting thorough due diligence. As Martin mentioned, it may enable the acquirer to have the criminal liability resolved before the acquisition and to begin with a clean slate. We've done this very successfully on behalf of clients in a number of cases.

Editor: What are some preliminary considerations when conducting an internal FCPA investigation?

Meyer: From the very start, you need to decide who should be conducting the investigation. Some FCPA investigations are perfectly appropriate for in-house counsel who, with the assistance of company audit, HR or other personnel within the company, should be able to conduct the investigation efficiently and effectively without engaging outside counsel. That said, there are many FCPA allegations for which – either because of the breadth of the allegation or the individuals implicated – it is absolutely impera-

tive that outside counsel conduct the investigation. Second, you must consider who the stakeholders are in the investigation. Is there a whistleblower? Are your outside auditors going to be interested in understanding what's going on? Be sure that you have all the various stakeholders in mind when you kick off an investigation, so you can structure and conduct it accordingly. One of the most important preliminary considerations is to have somebody experienced in FCPA matters examine the specificity and credibility of the allegation because that assessment will determine many issues, including how you approach and handle the investigation; whether or not (and why or why not) you will go to the government with the allegations; and how management and the board will be involved.

Editor: Can early self-disclosure be an ameliorating influence with the SEC and DOJ?

Clark: Yes, it can be very important. As Martin indicated earlier, our advice to clients is to consider self-disclosure very carefully. On the one hand, there are many valid reasons to engage in voluntary disclosure with the DOJ and the SEC – sometimes your hand is forced or you may be depending on their leniency.

On the other hand, sometimes there are factors that warrant a more cautious approach to self-disclosure. This decision almost always requires consultation with experienced outside FCPA counsel.

Editor: Have the three of you seen more declinations on the part of the SEC and DOJ to prosecute?

Meyer: My impression is that the agencies are simply being more open about the cases they are declining. The three of us have had many cases go to DOJ and the SEC that have not resulted in enforcement actions, but such cases were often declined without any kind of communication from the DOJ or SEC – so information on the number of declinations has not been in the public domain. However, perhaps because they've been unfairly criticized for not declining cases, the DOJ and the SEC are beginning to be more open about when they do so. So while the actual number of declinations may not have changed, the agencies are becoming more transparent about them.

Weinstein: As former members of the Department of Justice, I think it's fair to say that we're very pleased with the development of the FCPA enforcement practice there. We find their approach to be very sophisticated and reasonable, and we think that more than ever the DOJ appreciates the significant challenges that companies face. Our experience has been that the DOJ has treated us and our clients fairly.

Editor: Please tell us about the issues that may arise when conducting a multijurisdictional investigation, such as conflicting privacy laws, evidence sharing and compelling testimony.

Clark: These cases necessarily are multijurisdictional. They happen all over the world, and the issues that arise when conducting or defending investigations across many countries are getting more and more complicated. The enforcement of anticorruption laws outside the United States today is vastly different from what it was five years ago, and it will probably be vastly different five years from now. Today it's not just a question of dealing with the Department of Justice and the SEC; it's a question of dealing with UK, French or other European regulators. It may be a question of dealing with regulators in developing countries such as India or Indonesia. You have to consider which regulators may have a stake in what you're doing and determine the best way to deal with them. For example, if you voluntarily disclose to one, do you voluntarily disclose to all? Keep in mind that not all jurisdictions have an apparatus set up to receive a voluntary disclosure. Similarly, data privacy laws can complicate matters because while you may know what information you need for an investigation, whether you can get it and whether you can bring it into the United States are very different questions. There are ways to work around and through these issues while complying with U.S. and other countries' laws, but identifying these issues in advance and understanding how best to navigate them requires a great deal of forethought and experience. In our book, we lay out issues such as international evidence gathering and data privacy and articulate methods of working through the challenges they present.

Editor: Do you discuss the UK Bribery Act?

Weinstein: Yes. In fact, we anticipated the convergence of U.S. and UK enforcement very early on, which is why we recruited Peter Burrell – a solicitor resident in Willkie's London office and former head of compliance and enforcement at the British law firm Herbert Smith – to write a chapter on the UK Bribery Act. We felt that by virtue of having Peter we'd have the strongest transatlantic compliance and enforcement practice in the world. I think our book reflects our vision that the UK enforcement is going to be an increasingly significant influence in the anticorruption landscape around the world.

Meyer: The book discusses how the Bribery Act is similar to and different from the FCPA and covers topics such as facilitation payments and the defenses available under the UK Bribery Act, including the adequate procedures defense, which is a defense to the Bribery Act's strict liability provision for failure to prevent bribery by associated persons but is not available as a defense under the FCPA.

Weinstein: We compare the current state of multijurisdictional compliance to playing three-dimensional chess. One investigation may have aspects before authorities in the U.S., France, and the UK, as well as in developing countries. You may be dealing with four or five different sovereigns at the same time. It's such a fascinating practice, and we hope that our book helps people navigate the many issues. We also hope they will give us a call when they need our expertise!

The most important thing we want to say is that we would greatly appreciate feedback from readers of our book. We'd like to think we have produced a treatise that is practical, useful and informative for counsel in their day-to-day practice, and we hope to continue the discussion in this interesting area of law.

Editor: How may readers obtain the book?

Meyer: They can go to lawcatalog.com or they can call 1-877-807-8076.