

Morgan Lewis

Foreign Corrupt Practices Act (FCPA)
2010 Mid-Year Review



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Topics of Discussion

- Overview of the FCPA
- Review of FCPA enforcement in 2010, including enforcement trends and initiatives in the United States and abroad
- The new UK anticorruption legislation and how it might affect your business
- Due diligence and compliance lessons learned so far during 2010
- Q&A

Overview of the FCPA

FCPA's Two Prongs

ANTIBRIBERY PROVISIONS:

Prohibit bribery of foreign government or political officials for the purpose of obtaining or retaining business or securing any improper business advantage

BOOKS & RECORDS PROVISIONS:

Require SEC-registered or reporting issuers to make and maintain accurate books and records and to implement adequate internal accounting controls

Antibribery Prohibited Acts

- It is unlawful for
 - an issuer, domestic concern, or anyone acting within the jurisdiction of the United States
 - with “corrupt intent”
 - directly or indirectly
 - to offer, pay, promise to pay, or authorize payment
 - of “anything of value”
 - to a “foreign official”
 - for the purpose of obtaining or retaining business or securing any improper business advantage

To Whom Do the Antibribery Provisions Apply?

- Any “**issuer**” that files reports to the SEC or trades equity or debt on a U.S. exchange
 - Includes any foreign company that trades, for example, American Depository Receipts (ADRs), on a U.S. exchange.
 - Examples: Statoil, Novo Nordisk
- Any “**domestic concern**”
 - Includes U.S. citizens, nationals, and residents as well as any entity (corporation, partnership, etc.) that is organized under the laws of the United States or a U.S. territory or that has its principal place of business in the United States.
 - Examples: Bourke, Omega Advisors
- Any “**person**,” including an organization, wherever located, that, while in the territory of the United States, does any act in furtherance of the prohibited conduct
 - Government argues minimum contacts include emails, telephone calls, and transfers through correspondent bank accounts in U.S. intermediary banks
 - Examples: Siemens, KBR, Sapsizian

Are There Any Exceptions?

- The FCPA permits “facilitating payments”
 - Purpose of payment must be to expedite or secure performance of “routine governmental action” by a foreign official
 - *Action must be “ordinarily and commonly performed” by the foreign official (for example, stamping passports)*
 - *Does not include decision by foreign official whether, or on what terms, to award new business to or to continue business with a particular party*
- **BUT** some companies no longer allow these types of payments
- **AND** facilitating payments are not always permitted under local foreign law

“Affirmative Defenses” Under the FCPA

- Promotional payments
 - “Reasonable and bona fide” expenses
 - *promotion, demonstration, explanation of products*
 - *execution or performance of contract*
 - Proper documentation of expenditures
- “Lawful” under local law statutes
 - Has never been recognized as a defense to a payment prohibited by the FCPA
 - Argued and rejected in *Bourke*
 - Law must be a written statute

Books and Records

- Books and records
 - Books, records, and accounts must be kept in reasonable detail to accurately and fairly reflect transactions and dispositions of assets
 - Applies to issuers
 - *Parent companies may be liable for false or fraudulent entries on any book or record that is ultimately consolidated with an issuer's books and records for financial reporting purposes*

Penalties for Violation of FCPA Provisions

- Significant monetary and criminal penalties
 - Antibribery violations
 - *Fines up to \$2 million per violation*
 - *Culpable individuals may face fines of up to \$250,000 per violation and/or imprisonment for up to five years*
 - Books and records and Internal Control Violations (willful)
 - *Corporate fines in excess of \$25 million for a company*
 - *Fine up to \$5 million and/or imprisonment for up to 20 years for culpable individuals*
 - Alternative Fines Statute, 18 U.S.C. § 3571(d)

Possible Collateral Consequences of FCPA Violations

- Termination of government licenses
- Debarment from government contracting programs
- Disgorgement of a company's profits on contracts secured with improper payments
- Tax implications
- Shareholder litigation
- Foreign enforcement actions
- Appointment of independent compliance monitors

Review of FCPA Enforcement in 2010

FCPA: Continued Pressure from the Top

- “[C]ombating corruption [is] one of the highest priorities” of DOJ... The targets of this enforcement effort are “bribe payers of all stripes: large corporations and small companies; powerful CEOs and low-level sales agents; U.S. companies and foreign issuers; citizens and foreign nationals; direct payers and intermediaries.”
 - [Attorney General Holder](#) addressing OECD in May 2010
- “All U.S. issuers must comply with anti-bribery laws.”
 - SEC Director of Enforcement [Robert Khuzami](#) in June 2010 with the Technip announcement

Trends

- Proactive U.S. Government Enforcement
- SEC Initiatives
- Increased Cooperation Among Nations
- Compliance Monitors

Proactive U.S. Government Enforcement

- Corporations
- Individuals (givers and receivers of bribes)
- Sting tactics

Proactive – Corporations

- Large Cases
 - BAE (false statements charge; not FCPA): \$400 million
 - Snamprogetti (Halliburton/KBR Nigeria Bonny Island LNG facility case): \$240 million criminal fine and part of \$125 million in disgorgement with ENI jointly
 - Technip (Halliburton/KBR Nigeria Bonny Island LNG facility case): \$338 million (\$240 million criminal fine and \$98 million disgorgement)
 - Daimler (Two subsidiaries pleaded guilty and two subsidiaries entered into DPAs): \$93.6 million criminal fine and \$91.4 million disgorgement
- Small Cases
 - Veraz Networks, Inc. (\$4,500 in gifts and offer to pay \$35,000 bribe): \$300,000 civil penalty to SEC
 - Four employees of Alliance One International, Inc. (\$3 million in bribes in Kyrgyzstan and \$500,000 in bribes in Thailand): \$40,000 civil fines for each
 - NATCO Group Inc. (created and accepted false documents while paying extorted immigration fines and obtaining immigration visas in Kazakhstan): \$65,000 civil penalty to SEC

Proactive – Individuals

- “Let me be clear, prosecuting individuals is a cornerstone of our enforcement strategy because, as long as it remains a tactic, paying large monetary penalties cannot be viewed by the business community as merely ‘the cost of doing business.’ The risk of heading to prison for bribery is real, from the boardroom to the warehouse.”
 - [Attorney General Holder](#), May 2010

Proactive – Individuals (Bribe Givers)

- Longest prison term for FCPA-related crimes
 - Charles Jument
 - *87 months*
 - *After pleading guilty*
 - *FCPA conspiracy and false statements*
 - *Only \$212,400 paid to Panamanian officials so that his company could obtain contracts*
- Extradition of foreign nationals
 - Two UK citizens allegedly involved in the Halliburton/KBR Nigeria case, Wojciech Chodan and Jeffrey Tesler, lost their extradition hearings in March and April 2010
 - In the Control Components Inc. case, an Italian citizen, Flavio Ricotti, was extradited from Germany to the U.S. in July 2010

Proactive – Individuals (Bribe Recipients)

- Haiti Teleco case
 - Former Director of International Affairs for state-owned Haiti Teleco, Robert Antoine, pleaded guilty to money laundering connected to an FCPA violation and was sentenced in June 2010 to 48 months
 - Jean Rene Duperval, another Haiti Teleco official, was also indicted on money laundering charges
- Patricia and Gerald Green case
 - Former Governor of the Tourism Authority of Thailand, Juthamas Siriwan, and her daughter Jittisopa Siriwan indicted for money laundering in connection with the Thai film festival case

Individuals – Stings

- 22 individuals indicted in December 2009 (sealed) and arrested in Las Vegas in January 2010
 - Use of undercover agents posing as sale agents to convince individuals to offer to pay bribes
 - “From now on, would-be FCPA violators should stop and ponder whether the person they are trying to bribe might really be a federal agent.” Ass’t A.G. Lanny Breuer
 - In June, the FBI announced increasing its FCPA enforcement unit by 33% (from 12 to 16)
- Corporate and individual ramifications
- Industrywide focus, e.g. pharma

SEC Cooperation Initiative

- Announced January 13, 2010
- A “game changer” for the Enforcement Division
- New cooperation tools
 - Cooperation agreements
 - Deferred prosecution agreements
 - Nonprosecution agreements
- SEC rules amended to allow the Director of Enforcement to seek immunity order from DOJ
- New financial reform legislation increases whistleblower rewards and protections

Warning to Would-Be Wrongdoers

- “The reality is that when you engage in misconduct, you now have to think even harder about the possibility of others coming forward to report to the SEC your secret conversations, your hushed plans, your schemes and deceptions.”
 - [Robert Khuzami](#), Director, Division of Enforcement, U.S. Securities and Exchange Commission, New York, NY, January 13, 2010

Specialized SEC FCPA Enforcement Unit

- August 2009:
 - SEC announces five national specialized units
 - January 13, 2010:
 - SEC announces that Cheryl J. Scarborough will lead the FCPA unit
- Better capability to detect emerging fraud and misconduct
 - Greater capability to file cases with “strike-force speed”
 - Increase in enforcement division expertise

Increased Cooperation Among Nations

- Innospec, Inc. and Innospec Ltd.
 - Oil for Food prosecution
 - Innospec, Inc. settled criminal and civil matters with DOJ and SEC, respectively
 - Innospec, Ltd. (UK subsidiary) pleaded guilty in court in agreement with the Serious Fraud Office agreement
 - U.S. prosecution involved OFAC charges as well
 - \$40.2 million in fines and penalties (to DOJ, SFO, SEC, and OFAC)
- UK antibribery legislation
- OECD review of compliance with convention

Compliance Monitors

- Monitors are not required in all cases but they continue to be used as a tool in FCPA settlements
- In addition to U.S. companies, U.S. authorities also have required non-U.S. issuers to retain independent compliance monitors (e.g., Technip, Daimler, BAE)
- But the imposition of monitors continues to face strong criticism (e.g., Innospec)
- Although the use of monitors is expected to continue, we are seeing more flexibility by the regulators than in years past in connection with, for example, the:
 - Selection process
 - Length of monitorships
 - Ability to rely on internal resources

The New UK Bribery Act

Overview of the 2010 UK Bribery Act

- Sweeps away old law on bribery
- New offences:
 - 2 “general” offences: bribery and taking a bribe
 - Bribery of foreign public official
 - Corporate offence: failure to prevent bribery

General Offences

- Bribery: offering, etc. an advantage to another person
 - Intending to induce or reward improper performance of a relevant function, or
 - Knowing acceptance constitutes improper performance
- Taking a bribe:
 - Requesting, accepting, etc. an advantage
 - *intending, in consequence, or as a reward for, improper performance of a relevant function, or*
 - *where acceptance constitutes improper performance*
 - Performing improperly (including procuring improper performance) in anticipation of an advantage

What is a “Relevant Function”?

- Type of function
 - Any function of a public nature
 - Any activity connected with a business
 - Any activity performed in the course of employment
 - Any activity performed by or on behalf of a body of persons
- Function only matters if the person performing function is
 - Expected to do so either (a) in good faith or (b) impartially
 - Is in a position of trust by virtue of performing it

What is “Improper Performance”?

- Performance (or failure to perform) in breach of a “relevant expectation”
 - Not in the manner expected by the relevant expectation condition (e.g. impartially)
 - Past performance may be relevant
 - Expectation based on what a reasonable person in the UK would expect
 - Local custom or practice to be ignored unless permitted or required by local written law

General Offenses: Points to Note

- Advantage may be “financial or other”
- In most cases, the recipient need not be the same as the person performing the function
- Bribery/taking bribes through a third party is covered
- The advantage need not benefit the recipient
- For some offences, recipient need not know/believe the performance of the function is improper
- Body corporate may commit general offence or FPO offense (senior officer may also be guilty if consented or connived)

Bribery of Foreign Public Officials (s.6 Offence)

- Bribing a foreign public official (F) if intent is to influence F in F's capacity as FPO, intending to obtain/retain business or business advantage
- Broadly overlaps with s.1 offence:
 - Believe included to ensure OECD compliance
 - However, arguably even stricter: cf. “influence” to “improper performance”

Bribery Offences: Issues to Consider

- Wide-ranging. Could include, e.g.
 - Facilitation payments - no carve-out
 - “Excessive” hospitality
 - Nepotism
 - Offset arrangements (e.g. building schools or roads)
- Reliance on prosecutorial discretion:
 - Need consent of a senior prosecution authority figure to prosecute (e.g., DPP or Director of SFO)
 - No formal “public interest” test

Failure to Prevent Bribery (s.7 Offence)

- “Relevant commercial organisation” (C) commits an offence if person (A) “associated” with C bribes another person intending to obtain/retain business or a business advantage for C
- Strict liability offence
- Defense if C can prove it had in place “adequate procedures” designed to prevent persons associated with C from undertaking such conduct

s.7 Offense: Some Terms Explained

- “Relevant commercial organisation”:
 - UK body corporate or partnership that carries on business anywhere
 - Non-UK body corporate or partnership which carries on a business, or part of a business, in the UK
- “Bribe”: any act which would be an offence under s.1 (bribery) or s.6 (FPO offence)
 - Whether or not A prosecuted
 - UK connection requirement ignored for this purpose

s.7 Offence: Some Terms Explained (Cont.)

- “Associated”
 - A associated with C if A “performs services” for or on behalf of C, in whatever capacity
 - Nonexclusive examples: employee (presumed), agent or subsidiary
 - May extend much further, e.g., suppliers, joint ventures, advisers
 - Determined by all relevant circumstances, not just nature of relationship

s.7 Offence: Some Terms Explained (Cont.)

- “Adequate Procedures”: no further explanation but “guidance” to be issued by UK government
 - Consultation in September; final guidance early 2011
 - Likely to be based on existing international guidelines, e.g., OECD, Transparency International
 - Likely to be principles based: will need to tailor to specific circumstances, e.g. size, industry sector, geographic reach, transaction type
 - High-risk industries may have to be more robust

Jurisdictional Reach of Act

- General offences and FPO offence:
 - any act forming part of offence occurs in UK
 - otherwise, if acts would constitute an offence in UK and are committed by person with “close connection” with UK (citizens, residents, and UK corporations)
- Corporate offence
 - UK corporation or partnership
 - Non-UK companies carrying on a business (or part of a business) in UK
 - acts of associated person constituting bribery may take place anywhere, i.e. the “close connection” requirement does not apply

Penalties

- General offences and IPO offence
 - individuals: 10 years imprisonment or unlimited fine
 - other persons: unlimited fine
- Corporate offence: unlimited fine
- May trigger:
 - automatic ban on tendering for public procurement contracts
 - recovery/confiscation order: all proceeds of crime

Timing

- Act not yet in effect
 - Act will come into effect in April 2011
 - consultation process on guidance on “adequate procedures” to commence in September
 - guidance expected to be issued early in 2011
- Need to start preparing s.7 compliance programs now to be ready for new regime

Comparison to FCPA

- Extends to “private to private” bribery
 - e.g. payment to an employee in procurement department to favor bid
- No carve-out for facilitation payments
 - likely to be a criminal offence; dependent on prosecutorial discretion
- No formal advisory service (cf. service provided by US A-G)
- Jurisdictional reach e.g. could catch U.S. company with any business in the UK making facilitation payments in Indonesia
- No discretion on imposition of public procurement ban
- Current uncertainties in UK re plea bargaining

Conclusion

- Law deliberately drafted widely, with limited carve-outs
 - Lack of clarity as to what is and is not permitted
 - Impact on “normal” business activities, e.g. hospitality, facilitation payments
 - Reliance on prosecutorial discretion
- New corporate offence designed to force businesses to be proactive in tackling corruption
 - Act urgently to review existing procedures, etc.
 - Greater need to screen and monitor business partners

Compliance: Practical Responses to a Dynamic Enforcement Environment

Components of an “Effective” Compliance Program

- Compliance program components include:
 - Clearly articulated corporate policy and procedures
 - Consistent and comprehensive training
 - Oversight, monitoring and reporting system (e.g., hotline)
 - Disciplinary procedures to address violations
 - Due diligence and oversight of agents, business partners, vendors, joint ventures
 - Financial and accounting procedures to ensure internal controls, and accurate books, records, and accounts
 - Periodic reviews of compliance program
 - Documentation of compliance efforts

Evaluating Effectiveness of Controls: Where to Start

Understand Existing Controls

- Anticorruption and related policies (e.g., T&E, AML, export, gifts)
- Anticorruption procedures
 - Due diligence
 - Monitoring
 - Recordkeeping
 - Certifications
- Prior assessments or audits (if any) of anticorruption program and financial controls

Assess Business Practices and Related Risks

- Target units or systems with history of control weaknesses or deficiencies
- Focus on high-risk markets, acquisitions, third-party relationships, and conduct
- Focus on government-facing or highly regulated segments
- Consider how company handles foreign office budgets and payment of invoices
- Understand your business

Benchmarking Current Environment

- Benchmark existing policies, procedures, and controls through review of key documents, interviews, and field visits
 - Are employees sufficiently aware of policies and procedures?
 - Is there appropriate training?
 - Are the policies and procedures appropriately tailored for the business today (i.e., are they outdated or too broad)?
 - Does the company require compliance certifications? What do they cover?
 - How is compliance documented by the program? Are the requisite approvals being obtained?
- Consider local laws, regulations, and industry codes of conduct
- Consider industry/competitor challenges

Expectations of U.S. Regulators

- Clues found in:
 - Recent settlements
 - Technip (creating documentation, such as due diligence questionnaires and certifications, is not enough)
 - Snamprogetti and ENI (supervision/monitoring of subsidiaries and business partners is required)
 - DOJ Opinion Releases
 - Release No. 08-02 (Halliburton (Expro)) (due diligence)
 - Release No. 04-02 (Vetco Gray companies (related to ABB/Vetco Gray/Aibel Group Ltd matters) ("effective" compliance programs)

Considerations for Third-Party Relationships



Risk-Based Due Diligence

- Due diligence: an investigation of risks across a number of regulatory and business issues
- Overall objective of due diligence
 - Understand and evaluate initial and ongoing risk of doing business with a third party
 - Evaluate range of options to limit risk
- Risk-based due diligence requires more work based on risk associated with the activity. Includes a focus on:
 - High-risk territories, industries
 - Transactions with third parties
 - *M&A and joint ventures*
 - *Consultants, agents, and other third parties*

Assessing and Addressing Problems

- Understand the facts and the scope of the activity
- Remediate
 - Make sure the prohibited activity is stopped
 - Address lapses, if any, in controls and implement improvements
 - Consider appropriate disciplinary measures
 - Terminate business relationships with relevant vendors, consultants, or partners
 - Conduct corrective training
- Consider disclosure?
 - Outside auditors
 - Financial statements/regulatory filings
 - U.S. or foreign authorities

Anticorruption Compliance: A Requirement for Global Businesses

- Liability risks are too great to ignore
- Effective compliance programs are expected
 - In fact, the lack of an effective program can increase potential liability
 - Current draft of UK anticorruption bill places a great emphasis on effective compliance programs
- Certifications and due diligence questionnaires are not enough, i.e., you must do more than create a “paper trail”

Q&A



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