

Morgan Lewis

Foreign Corrupt Practices Act (FCPA) 2010 Year in Review

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Topics of Discussion

- Overview of the FCPA
- The Rise of SEC Enforcement & the Dodd-Frank Act
- The UK Bribery Act
- 2010 Enforcement Trends
- FCPA Compliance Programs from the DOJ's Perspective
- 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 Depositary Receipts (ADRs) on a U.S. exchange.
- 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.
- 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, transfers through correspondent bank accounts in U.S. intermediary banks

Application of the FCPA to Foreign Companies and Individuals

- We used to say that foreign companies are not under FCPA jurisdiction unless they acted within the U.S.
- “ . . . we do not only prosecute U.S. companies and individuals under the FCPA. Indeed, over the last five years, more than half of our corporate FCPA resolutions have involved foreign companies or U.S. subsidiaries of foreign companies.”

- Assistant Attorney General Lanny Breuer, Nov. 16, 2010

What Do You Have to Do to Be an “Agent”?

- *SEC v. ENI, S.p.A. and Snamprogetti Netherlands B.V.*
- Settled for \$125 million to SEC; \$240 million to DOJ
- SEC Complaint alleges:
 - ENI is an Italian company with an SEC-registered class of securities and therefore an issuer (common stock and ADRs)
 - Snamprogetti Netherlands was a wholly owned sub of Snamprogetti, S.p.A., which was a wholly owned sub of ENI
 - “ENI exercised control and supervision of its wholly-owned indirect subsidiary Snamprogetti during the relevant time and on certain of its business decisions, such as Snamprogetti’s entry into the joint venture.”
 - Snamprogetti’s books were false and were consolidated into ENI’s financial statements
 - “ENI’s policies and procedures governed Snamprogetti’s use of agents. ENI failed to ensure that Snamprogetti conducted due diligence on agents hired through joint ventures in which Snamprogetti participated. As a result, ENI’s internal controls failed to detect, deter or prevent the decades-long bribery scheme.”

What Do You Have to Do to Be an “Agent”?

- United States v. Enrique Faustino Aguilar Noriega and Angela Maria Gomez Aguilar
 - Indicted September 15, 2010
 - ABB Inc./Lindsey Manufacturing Co.
- Alleged bribes paid through Grupo Internacional de Asesores S.A.
 - Grupo hired by Lindsey Mfg. Co.
 - Enrique and Angela were officers of Grupo
 - The indictment alleges FCPA jurisdiction based on Grupo’s acting as an agent of a domestic concern, as defined in 15 U.S.C. § 78dd-2(h)(1), and that as a director of Grupo Enrique was an agent of a domestic concern
 - In addition, because Enrique was a lawful permanent resident of the United States, he also is alleged to be a "domestic concern" under the FCPA

How is “Foreign Official” Defined?

- Statutory definition includes:
 - Foreign government employees or officials
 - Political officials or members of their staffs
 - Employees of public international organizations
 - Candidates for political office
- Has also been interpreted by DOJ to include:
 - Employees of government-owned or government-controlled businesses
 - *Employees of state-owned telecommunications companies (Granados and Caceres (Honduras))*
 - *Employees of state-owned utilities (Lindsey Mfg. Co. and ABB (Mexico))*
 - *Employees of state-owned or state-controlled hospitals (Syncor)*
 - *Employees of state-owned or state-controlled media outlets, e.g., Chinese journalists (DOJ Opinion Letter 08-03)*
- Does not include consultant with extensive contacts with a foreign government and which is a registered agent of the foreign government (DOJ Opinion Letter 10-03)

Are There Any Exceptions?

- The FCPA permits “facilitating payments”
 - Purpose of payments 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
 - Has never been recognized as a defense to a payment prohibited by the FCPA
 - Recently argued and rejected in *Bourke*

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

The Rise of SEC Enforcement & the Dodd-Frank Act

Potential “Game Changers”

- A national specialized FCPA unit
- New cooperation tools
- An increased focus on individual liability
- The Dodd-Frank Act whistleblower provisions

Specialized SEC FCPA Enforcement Unit

- Better capability to detect emerging fraud and misconduct
- Greater capability to file cases with “strike-force speed”
- Increase in enforcement division expertise
- Broader array of cooperation and intelligence tools

New Cooperation Tools

- Cooperation agreements
 - Source can receive credit for information provided
- Deferred prosecution and nonprosecution agreements
 - Agree not to pursue enforcement action
- Proffer agreements
 - Agree not to use individual's statement in subsequent proceedings
- SEC rules amended to allow the Director of Enforcement to seek immunity order from DOJ

An Increased Focus on Individual Liability

- Direct liability
- Aiding and abetting liability
 - Authority to implement internal controls + Awareness of prohibited payments + Knowledge or recklessness in not knowing payments improperly recorded
- Control person liability
 - Supervisory responsibility for those responsible for books and records and internal controls + Failure to supervise + Failure by subordinates to make and keep accurate books and records or implement internal controls

The Dodd-Frank Act: Whistleblower's Bounty

- The SEC will pay an award to one or more whistleblowers who:
 - (1) Voluntarily provide the SEC
 - (2) With original information
 - (3) That leads to the successful enforcement by the SEC of a federal court or administrative action
 - (4) In which the SEC obtains monetary sanctions totaling more than \$1,000,000
- The amount of the award will be at least 10% and not more than 30% of the monetary sanctions that the SEC collects and that other specified authorities collect in a “related action”

The Dodd-Frank Act: Whistleblower's Bounty

- Does not authorize qui tam actions—so potential whistleblowers need not establish a prima facie FCPA violation
- Authorizes the SEC to share whistleblower-provided information with enumerated federal, state, and foreign enforcement authorities
- More than \$450 million allocated to the whistleblower fund for FY2010
- Raises disclosure considerations

The UK Bribery Act

Overview of the UK Bribery Act 2010

- Enacted in April 2010
- 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
- Broad-brush, almost “principles-based” approach
- Implementation delayed until later in 2011

The UK Bribery Act & the FCPA

Significant Differences

- No exception for facilitating payments
- Question regarding whether UK Bribery Act permits promotional activity
- “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
 - Defence if C can prove it had in place “adequate procedures” designed to prevent persons associated with C from undertaking such conduct

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 FPO 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

2010 Enforcement Trends

Tough Stand on FCPA Prosecutions

- As to criticism that the FCPA is bad for business:
 - “FCPA enforcement is not bad for business; it is, instead, vital to ensuring the integrity of our markets. Our FCPA enforcement program serves not only to hold accountable those who corrupt foreign officials, but in doing so it also serves to make the international business climate more transparent and fair for everyone.”
 - “I continue to believe that prosecuting individuals—and levying substantial criminal fines against corporations—are the best ways to capture the attention of the business community.”

Assistant Attorney General Lanny Breuer, Nov. 16, 2010

DOJ Team

- Denis McInerney leads the fraud section
- Charles Duross, deputy chief of the FCPA unit
- More than 12 attorneys dedicated solely to FCPA cases
 - Does not include local AUSAs
- 16 FBI agents dedicated to the FCPA unit
- Kleptocracy Initiative directed at recovering foreign corruption proceeds
 - FCPA team working with Asset Forfeiture and Money Laundering Section

Blockbuster Fines

9 of the 11 Largest FCPA Fines

- **More than \$1.6 Billion in 2010**
 - **BAE Systems plc** - \$400 million to U.S.; €30 million to UK
 - **Snamprogetti Netherlands B.V./ENI S.p.A.** - \$365 million
 - **Technip S.A.** - \$338 million
 - **Daimler AG (with 2 subsidiaries)** - \$185 million
 - **Alcatel-Lucent S.A. (with 3 subsidiaries)** - \$137.4 million
 - **Panalpina World Transport (Holding) Ltd. and Panalpina Inc.** - \$81.9 million
 - **ABB Ltd. (with 2 subsidiaries)** - \$58.3 million
 - **Pride International and Pride Forasol** - \$56.1 million
 - **SNEPCO** - \$48.1 million

Cooperation Credit from DOJ?

- Nonprosecution agreements (NPAs) or not charging
 - RAE Systems – NPA with \$1.7 million criminal penalty
 - “(a) RAE Systems's timely, voluntary, and complete disclosure of the facts . . .; (b) RAE Systems's thorough, real-time cooperation with the Department and the [SEC]; (c) the extensive remedial efforts already undertaken and to be undertaken by RAE Systems; and (d) RAE Systems's commitment to submit periodic monitoring reports to the Department.”
 - Noble Corporation – NPA with \$2.59 million criminal penalty
 - *early voluntary disclosure*
 - Alliance One – NPA (two subs pay total fine of \$9.45 million)
 - eLandia International Inc. acquired Latin Node and disclosed the improper payments by Latin Node (Latin Node pleaded guilty (2009) and two officers indicted (2010))

Cooperation Credit – DPAs

- Deferred prosecution agreements (DPAs) and/or designation of subsidiaries to plead guilty
 - Alcatel-Lucent gets DPA (three subs pleaded guilty) (post-merger there was cooperation)
 - Panalpina World Transport and Panalpina, Inc.
 - Shell Nigeria Exploration and Production Company Ltd.
 - Transocean Inc.
 - Tidewater Marine International Inc.
 - Pride International, Inc. (but Pride Forasol pleaded guilty)
 - ABB Ltd.
 - Technip S.A.
 - Daimler AG (two subs pleaded guilty)

Cooperation Credit – Fines at the Bottom or Below Guidelines Ranges

- Noble Corporation paid \$2.59 million, said to be below the fine range
- Daimler AG paid \$93.6 million below a fine range of \$116 million to \$232 million
- Snamprogetti paid \$240 million below a fine range of \$300 million to \$600 million
- Alcatel-Lucent paid \$92 million in a fine range of \$86,580,000 to \$173,160,000

Corporate Monitors

- Required to hire independent compliance monitor
 - Alcatel-Lucent
 - Alliance One International Inc.
 - Universal Corporation and Universal Brazil
 - Technip S.A.
 - Daimler AG
 - Innospec Inc.
 - BAE Systems, plc
- Required to adhere to the recommendations of an independent compliance consultant
 - ABB Ltd.
- Required to adhere to enhanced compliance and reporting obligations and submit periodic monitoring reports to DOJ:
 - RAE Systems, Panalpina World Transport, Shell, Pride International, Transocean, Tidewater, Noble Corporation

Individual Prosecutions

*“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 bribery is real, from the boardroom to the warehouse.**”*

Attorney General Eric Holder, May 2010

Blue Collar Methods for White Collar Crime

- 22 individuals from 15 companies – arrested in January 2010 and indictments unsealed
- 14 U.S.-executed search warrants; 7 UK executed search warrants
- Included at least two foreign nationals
- Use of undercover agents posing as sales agents to convince individuals to offer to pay bribes
- Offer to pay = FCPA violation
- Richard Bistrong pleaded guilty in September 2010
 - But not to the Shot Show allegations
 - Armor Holdings bribe to UN procurement officer, among other things
 - Plea agreement dated February 2009

2010 FCPA Sentencings

- Charles Jumet
 - 87 months' imprisonment
- Government sought long sentences, but judges went lower:
 - Nam Nguyen: 16 months (gov't sought 14-17 years); An Nguyen: 9 months (gov't sought 7-9 years); Kim Nguyen: probation (gov't sought "substantial" prison term); Joseph Lukas: probation (gov't sought "substantial" prison term)
 - Gerald & Patricia Green: 6 months' imprisonment; 6 months' home confinement (gov't sought 10 years)
 - Bobby J. Elkin, Jr.: Probation (gov't sought 38 months)

Cooperation with Other Countries

- Extraditions
 - Jeffrey Tesler, Wojciech Chodan, Flavio Ricotti
- “Partnership” with the UK’s Serious Fraud Office
 - Innospec and BAE Systems
- OECD Enforcement on the Rise
 - Adopted 1997
 - 38 Current Signatories
- Transparency International Report:
 - Active Enforcement – 7 countries (Denmark, Germany, Italy, Norway, Switzerland, U.K. and U.S.)
 - Moderate Enforcement – 9 countries
 - Little or No Enforcement – 20 countries

FCPA Compliance Programs from the DOJ's Perspective

What Does DOJ Expect From an FCPA Compliance Program?

- DPAs Spell Out FCPA Compliance Program Requirements
- E.g., Alcatel-Lucent DPA, Attachment C
- “At a minimum...”

Elements of an Acceptable FCPA Compliance Program

1. Develop and promulgate a policy and written compliance code.
2. Senior management will provide “strong, explicit and visible support and commitment” to policy and compliance program.

Elements of an Acceptable FCPA Compliance Program

3. Develop compliance “standards and procedures” to reduce prospect of anti-corruption law violations,
 - Which shall apply to “all directors, officers, and employees and, where necessary and appropriate, outside parties acting on behalf [of the company] in a foreign jurisdiction, including but not limited to, agents and intermediaries, consultants, representatives, distributors, teaming partners, contractors and suppliers, consortia, and joint venture partners”
 - And which shall include:
 - *Gifts*
 - *Hospitality, entertainment, and expenses*
 - *Customer travel*
 - *Political contributions*
 - *Charitable donations and sponsorships*
 - *Facilitation payments*
 - *Solicitation and extortion*

Elements of an Acceptable FCPA Compliance Program

4. Develop standards and procedures on the basis of a foreign bribery risk assessment addressing the company's
 - Geographical organization
 - Interactions with various types and levels of government officials
 - Industrial sectors of operation
 - Involvement in joint venture arrangements
 - Licenses and permits and their importance to the company's operations
 - Degree of governmental oversight and inspection
 - Volume of goods and personnel clearing through customs and immigration and their importance to the company's operations

Elements of an Acceptable FCPA Compliance Program

5. Review standards and procedures, including internal controls, ethics, and compliance programs, at least annually and update appropriately.
6. Assign responsibility to one or more senior corporate executives for implementation and oversight.
 - Direct reporting obligations to independent monitoring bodies (internal audit, BoD or BoD committee)
 - Adequate level of autonomy
 - Sufficient resources and authority to maintain autonomy

Elements of an Acceptable FCPA Compliance Program

7. Develop system of internal controls reasonably designed to ensure the maintenance of fair and accurate books so they cannot be used to conceal foreign bribery.
8. Communicate policies, standards, and procedures.
 - Periodic training for all directors, officers, and employees (agents and business partners where necessary and appropriate)
 - Annual certifications
9. Maintain an effective system for:
 - Providing advice on an urgent basis
 - Internal, and, where possible, confidential reporting by and protection of people reporting breaches
 - Responding to requests and reports

Elements of an Acceptable FCPA Compliance Program

10. Institute appropriate disciplinary procedures for violations.
 - Procedures to remedy the harm from misconduct and prevent further similar misconduct
 - Reassessing the program and modifying as necessary
11. Institute appropriate due diligence for the retention and oversight of agents and business partners.
 - Properly documented risk-based due diligence (hiring and oversight)
 - Informing agents and business partners of the standards and procedures against bribery
 - Seeking a reciprocal commitment

Elements of an Acceptable FCPA Compliance Program

12. Include standard provisions in agreements and contracts with agents and business partners, such as:
 - Anticorruption representations and undertakings
 - Rights to conduct audits
 - Rights to terminate as a result of a breach
13. Periodically review and test anti-corruption compliance code, standards, and procedures.
 - Improve effectiveness
 - Taking into account relevant developments in the field and evolving international and industry standards

Successor Liability

- RAE Systems Inc. used two joint ventures in China (RAE-KLH and RAE Fushun) to sell its products
 - Consolidated financial results of the JVs on its financial statements
- Conducted due diligence on RAE-KLH
 - Became aware of improper payments
 - Improper payments continued because RAE implemented internal controls only “halfway” so as not to “choke the sales engine and cause a distraction for the sales guys”
- Did not conduct due diligence on RAE Fushun despite red flags

Due Diligence for Acquisitions

- Know your target
 - Examples of inquiries include:
 - *Corporate Records*
 - Owners, key employees, and senior executives
 - Relationship to foreign officials and PEPs
 - OFAC/AML checks
 - *Reputational Due Diligence*
 - U.S. embassy
 - Published reports
 - Local contacts
- Evaluate how target was identified

Due Diligence for Acquisitions

Identifying Red Flags and Anticorruption Risk

- Identify potential interactions with foreign officials
 - Licenses, approvals, governmental filings
 - Contracts (business with state-owned entities—both sell and buy)
 - Taxes
- Identify agents, consultants, and representatives
 - Review agreements, due diligence files, and financial transactions in connection with third-party relationships
- Review customer lists
- Evaluate financial records and internal controls
- Review anticorruption policies, procedures, certifications, training, and audits (if available)
- Review litigation/regulatory issues

Life After the Acquisition

- Postacquisition follow-up
 - Implement and/or enhance anticorruption compliance program
 - Train employees
 - Reevaluate due diligence of third parties
 - Require written contractual agreements that include appropriate representations, warranties, and certification requirements
- Frequently asked questions
 - Are there time limits?
 - What are the potential successor liability issues?

Q&A



international presence

Beijing Boston Brussels Chicago Dallas Frankfurt Harrisburg Houston Irvine
London Los Angeles Miami Minneapolis New York Palo Alto Paris Philadelphia
Pittsburgh Princeton San Francisco Tokyo Washington Wilmington