

Morgan Lewis

Foreign Corrupt
Practices Act Update

October 27, 2011
Leslie Caldwell
Mark E. Matthews
Alison Tanchyk

Overview

- The Dodd–Frank Act Whistleblower Provisions
- The Rise of Global Anti-Corruption Laws
- FCPA Trials

Dodd-Frank Act Whistleblower Provisions

The Whistleblower's Bounty: Eligibility Requirements

- The SEC will pay an award to one or more whistleblowers who:
 - Voluntarily provide the SEC
 - With original information
 - About any possible (reasonable belief) violation of federal securities laws that has occurred, is ongoing, or is about to occur (facially plausible)
 - That leads to a successful federal court or administrative enforcement action by the SEC
 - In which the SEC obtains monetary sanctions totaling more than \$1M

Who Can Be a Whistleblower?

CAN

- Individuals who provide the SEC with information relating to a *possible* violation of the securities laws
- Employees, former employees, vendors, agents, contractors, clients, customers, and competitors
- Individuals involved in securities violations may be eligible whistleblowers

CANNOT

- Officer/Director/Trustee/Partner
- Anyone who has compliance/audit/legal responsibilities
- Member of investigation firm
- Public accountant
- Anyone who learns of a possible violation from any of the above individuals
- BUT THERE ARE EXCEPTIONS

Who Cannot Be a Whistleblower?

Exceptions to the Exclusions

- Attorneys, officers, directors, auditors, or compliance personnel are eligible for whistleblower awards IF:
 - he or she reasonably believes that disclosure to SEC is necessary to prevent the company from engaging in conduct likely to cause substantial injury to the company or its investors;
 - he or she reasonably believes that the company is engaging in conduct that will impede an investigation of the misconduct;
 - at least 120 days have passed since the whistleblower made an internal report to the company OR 120 days have passed since he or she received the information at a time when the information was already known internally; or
 - otherwise ethically permissible (for attorneys)

Information Provided Voluntarily

- Provided *before* the SEC, Congress, or any other federal, state, or local authority, a self-regulatory organization, or the Public Company Accounting Oversight Board asks for it
- Not considered as provided “voluntarily” if whistleblower is subject to a preexisting legal or contractual duty to report information on possible violations of the federal securities laws

Original Information

- Information based upon the whistleblower's independent knowledge or independent analysis that is not already known to the SEC and not exclusively derived from an allegation in a judicial or administrative hearing; in a government report, hearing, audit, or investigation; or by the news media

Not Original Information — Use of the Privilege

- The Commission will not consider information to be derived from independent knowledge or independent analysis in the following circumstances:
 - If the whistleblower obtained the information through a communication that was *subject to the attorney-client privilege*
 - Unless disclosure of the information would be permitted by an attorney under the SEC's attorney conduct or state ethics rules, such as the crime fraud exception

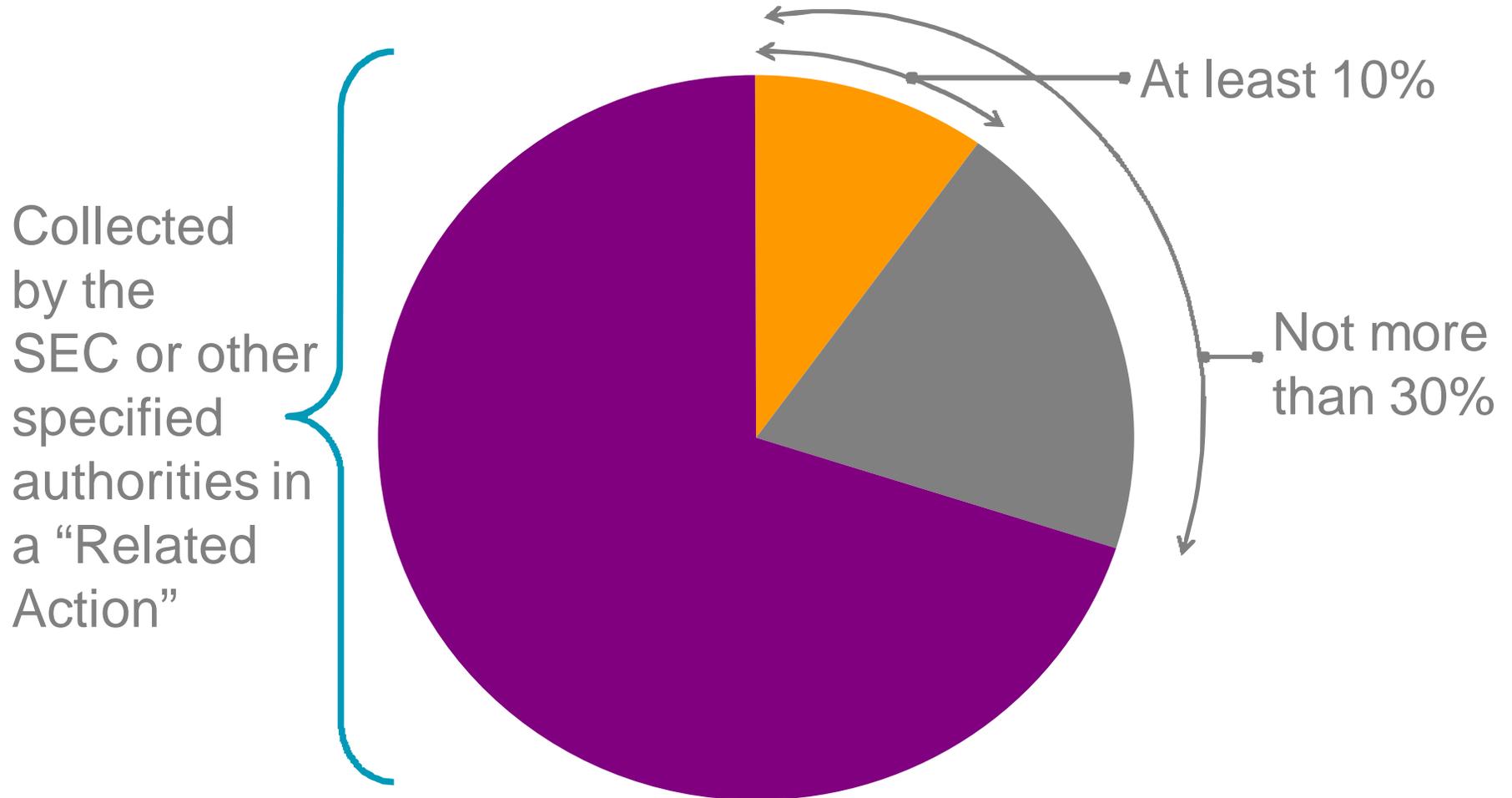
Exception to Original Information — Confidential Information

- The Commission will not consider information to be derived from independent knowledge or independent analysis in the following circumstance:
 - If it is obtained by a means or in a manner that *is determined by a United States court* to violate applicable federal or state criminal law
- Confidentiality agreements cannot preclude whistleblowing

Leading to a Successful Enforcement Action

- Information will be considered as having led to a *successful enforcement action* if:
 - it caused the SEC to commence a new examination or investigation and significantly contributes to the success of a resulting enforcement action; or
 - the conduct was already under investigation when the information was submitted, but the information is essential to the success of the action and would not have otherwise been obtained.

Amount of Award



Impact of Dodd-Frank

- Undermines internal reporting
 - No requirement to report through an internal compliance program
 - No financial incentive for reporting internally
 - Plaintiffs' counsel are actively recruiting whistleblowers
- Increases the likely number of SEC and DOJ investigations
- Requires an effective compliance program
- Requires more and better internal investigations

The Rise of Global Anti-Corruption Laws

The UK Bribery Act

1. 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*

2. Taking a bribe

- requesting, accepting, etc. an *advantage* *Performing improperly* (including procuring improper performance) in anticipation of an *advantage*

Relevant Function

- Any function or activity:
 - of a public nature
 - *connected with a business*
 - performed in the course of employment
 - performed by or on behalf of a body of persons
- Only captured 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

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***
 - *Constitution, legislation, written case law*

Advantage

- 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

The UK Bribery Act

3. Bribery of foreign public official

- if intends to influence the official in his or her official capacity, intending to obtain/retain business or business advantage
- does not require proof of *improper performance* or an intention to induce it
- No exception for facilitating payments
- Bona fide hospitality and promotional expenses permitted under certain circumstances

4. Corporate offense: failure to prevent bribery

s.7 Offense: Failure to Prevent Bribery

- *Relevant commercial organization* commits an offense if person *associated* with organization bribes another person intending to obtain/retain business or a business advantage for organization
- Strict liability offense
- Full defense if organization can prove it had in place *adequate procedures* designed to prevent persons associated with it from undertaking such conduct

Adequate Procedures

1. Proportionate Procedures

2. Top-level Commitment

3. Risk Assessment

4. Due Diligence

5. Communication (including training)

6. Monitoring and Review

Jurisdictional Reach

General Offenses & FPO

- Any act forming part of offense occurs in UK
- Any act occurring outside of the UK if acts would constitute an offense in UK and are committed by person with “close connection” with UK (citizens, residents, and UK corporations)

Corporate Offenses

- UK corporation or partnership
- Non-UK companies carrying on business in UK
- Acts of associated person constituting bribery may take place anywhere, i.e., *the “close connection” requirement does not apply*

Penalties

General Offenses & s.6

- individuals: 10 years imprisonment or unlimited fine
- other persons: unlimited fine

s.7 Corporate Offense

- unlimited fine

All Offenses May Trigger

- automatic ban on tendering for public procurement contracts
- recovery/confiscation order: all proceeds of crime

Comparison to FCPA

- Extends to private to private bribery
- No carve-out for facilitation payments
- No formal advisory service
- Broader jurisdictional reach
- No discretion on imposition of public procurement ban

China

- China's Criminal Law covers commercial bribery
 - Covers bribery of employees of SOEs
- Recently amended—*Crime of Offering Bribes to Officials of Foreign Countries and International Public Organizations*
- Prohibits entities and individuals from offering bribes to foreign officials to obtain illegitimate business benefits

Brazil

- Penal Code proscribes
 - Active and passive corruption of domestic officials,
 - Active bribery in international business transactions, and
 - Traffic of influence in international business transactions.
- Only individuals, and not corporate entities, can be held criminally liable for violating anti-corruption laws
- Draft Bill 6826
 - Submitted to the Brazilian Congress in 2010
 - Would permit a corporation to be held liable for any misconduct conducted by an agent of that company in violation of existing anti-corruption laws

Mexico

- Signed the OECD Convention and the UN Convention Against Corruption
- Penal Code criminalizes attempted corruption, passive and active bribery, extortion, bribing a foreign official, abuse of office, and money laundering
- Strengthened sentencing guidelines for corruption cases, with average penalties ranging from five to ten years
- Federal Anti-corruption Law
 - Passed by Mexican Senate in 2011
 - Applies to government contracts at the federal level and to acts beyond Mexican territory
 - Covers irregular activities by Mexican companies or individuals in international commercial transactions that involve a foreign official
 - Would also provide incentives for individuals and companies to assist the government in conducting its investigation by offering more lenient penalties for guilty pleas

Russia

- 2008 – President Dmitry Medvedev’s created an Anti-Corruption Council
- 2010 – President Medvedev signed a presidential decree introducing the “National Anti-Corruption Strategy”
 - Proposes increased fines for corruption, greater public oversight of government budgets, and sociological research
- 2011 – President Medvedev signed landmark anti-corruption bill into law, raising fines for giving or taking bribes up to 100 times the amount of the bribe, with the maximum fine being 500 million rubles (\$18.3 million)

India

- 1988 Prevention of Corruption Act criminalizes active and passive bribery, extortion, bribery of foreign officials, abuse of office, and money laundering
- Recent popular uprisings and mass demonstrations have added additional pressure onto the Indian government to effectively address the issue of corruption
- Proposal in Indian parliament to establish a citizen's Ombudsman
 - The Ombudsman would be an independent agency that would have the power to investigate civil servants and politicians suspected of corruption
- Parliament expected to consider new anti-corruption bill in November 2011
 - Bill will address “outdated systems,” that have to be dismantled as well as adding new laws and systems to stem corporate corruption

Rise of Global Anti-Corruption Laws — Impact

- Laws reach greater number of companies than FCPA alone
- Laws reach companies seeking to expand in high growth markets
- Laws reach commercial bribery
- Underscore importance of strong compliance programs
- Internal investigations must quickly identify scope

FCPA Trials

Shot-Show

- Twenty-two (22) defendants accused of trying to bribe foreign officials in several African countries to win contracts for the supply of military equipment and weapons
- District of Columbia
- Three (3) defendants – guilty pleas
- One (1) undercover informant

Joel Esquenzani

- Former president of Terra Telecommunications Corp.
- Southern District of Florida
- Accused of overseeing scheme to pay more than \$800,000 to shell companies between 2001 and 2005
 - Money was allegedly used later to bribe officers of Haiti's state-owned national telecommunications company—Telecommunications D'Haiti—to win Terra preferred rates and a reduction in the number of minutes for which payment was owed

Lindsey Manufacturing

- Lindsey is an electrical engineering company
- Central District of California
- President and the Chief Financial Officer
 - Convicted of violating the FCPA by paying sales representative Grupo Internacional de Asesores SA to provide gifts and money on high-level executives of Comision Federal de Electricidad I (“CFE”) in order to win contracts with the state-owned Mexican electrical utility
- Angela Augilar – wife of defendant Enrique Aguilar
 - Convicted of conspiracy – accused of signing checks for lavish gifts to CFE officials, including a \$297,000 check to Ferrari of Beverly Hills that paid for a sports car
- Fernando Maya Basurto Jr. – Mexican citizen
 - Pled guilty to conspiracy to violate the FCPA and commit money laundering; agreed to forfeit over USD \$2M and to cooperate; sentencing pending
- Challenge to “foreign official”
 - CFE not an explicit department or agency, but fits the definition of an “instrumentality” of the Mexican government under the FCPA
- All defendants convicted

Stuart and Hong “Rose” Carson

- Former CEO of Control Components, Inc. and his wife, sales manager for Hong Kong and Taiwan
- Central District of California
- “Flowers” provided to foreign officials to obtain business to officers and employees of state-owned customers in Korea, Malaysia, the United Arab Emirates, and China — including China National Offshore Corp
- Three executives pled guilty
- “Foreign official” definition challenge



international presence

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