Anti-Corruption and Other Compliance Issues

Presented to SCCE's Regional Compliance & Ethics Conference
Dallas, Texas
November 8, 2013

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Overview of Global Anti-Corruption Enforcement Landscape

Anti-Corruption Enforcement is on the rise

In the past three years, US prosecutors have aggressively enforced the FCPA to the tune of over $3.6 billion.

Germany, Spain, and other EU countries are increasing enforcement.

The UK Bribery Act became effective on July 1, 2011.

In response to international pressure, Canada is increasing enforcement of its anti-corruption law.

Overview of Global Anti-Corruption Enforcement Landscape

Foreign Bribery Laws Being Drafted in India and Indonesia

Russia has new anti-corruption laws and has now joined OECD.

Asia and Latin American countries have been slower to enact tough new anti-corruption laws and begin aggressive enforcement programs although Mexico and Brazil have recently enacted anti-corruption legislation.

China and the US are increasing cooperation and beginning to establish a framework for information sharing and enforcement; China has recently enacted its own foreign bribery law.

Risk of anti-corruption multi-jurisdictional "piggy-back" actions is growing significantly.

Initiatives on Combating Corruption

- UN Global Compact
- International Chamber of Commerce
- World Business Council
- Conference Board
- Transparency International
- TRACE
- Extractive Industry Transparency Initiative (EITI)
- International Assoc. of O&G Producers (OGP)
Overview of 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.
- 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.

Direct or Indirect Payments Covered by Law

- Statute prohibits unlawful payments directly or indirectly through a third party.
- Many enforcement cases involve indirect payments.
- Examples of third parties through whom illegal payments have been made:
  - Agents or consultants
  - Distributors
  - Joint venture partners
  - Lawyers/accountants
  - Service providers

What Qualifies as “Anything of Value”

- Anything of Value = Any Benefit.
- Must meet each of the other elements of a prohibited payment.
- Examples include but are not limited to:
  - Cash or the equivalent of cash such as a gift card, voucher, coupon
  - Entertainment or travel
  - Gifts that are more than a mere token or modest in value
  - Educational opportunities
  - Contributions to political parties, causes, candidates, and officials
  - Charitable contributions
  - Investments or property
  - Loan of a vacation home, automobile, or yacht, etc.
  - Giving a job to a family member or someone with a close personal relationship with foreign official.
How is “Foreign Official” Defined?

• DOJ and SEC read it very broadly.

  - 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 controlled businesses.
    - Doctors and other employees of state-owned or state-controlled hospitals (Pfizer, Orthofix).
    - Employees of state-owned or state-controlled media outlets, e.g. Chinese journalists (DOJ Opinion Letter 08-03).
    - 33-38% state-owned company (Comverse Technology).

Anti-Corruption Provisions: Government Officials

• Covers any Government Official, whether Federal, State or Local, including:
  - Ministers, Vice-Ministers, Ministry Employees
  - Politicians
  - Candidates for office
  - Officers of Political Parties
  - Police
  - Judges
  - Customs Officials
  - United Nations Representatives
  - World Bank Representatives

What Is an Unfair Business Advantage?

• Focus is on gaining a competitive advantage rather than directly securing a particular contract.

  - Examples include:
    - Con-way: Slotting on planes and faster customs clearance
    - Key: Lower customs and tax duties caused lowered expenses and gave a business advantage over competitors in market
    - Delta Pine: Government reports and certifications to sell seed
    - Vecto: Preferential treatment in customs clearance
    - Covinor: Influence on technical specifications to influence bid
    - Monsanto: Influence over legislation

  - The bribe does not need to achieve its intended effect.
    - Example: Monsanto
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.
  - Has never been recognized as a defense to a payment prohibited by the FCPA.
  - Recently argued and rejected in Bourke.

FCPA 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.
FCPA Record Keeping

- Affirmative duty to maintain accurate records.
- Requires Issuer to keep books, records & accounts which, in reasonable detail, accurately & fairly reflect transactions & disposition of assets.
- Reasonable detail is such level of detail & degree of assurance as would satisfy prudent officials in conduct of own affairs.
- Provisions apply to all payments, not merely sums that would be material in traditional financial sense.

Sample compliance sensitive accounts:
- Cash payments
- Expense reimbursements
- Commissions
- Entertainment/hospitality
- Gifts
- Freight forwarding charges
- Discounts
- Donations
- Charitable contributions
- Travel
- Business development
- Consulting
- Legal fees
- Agency fees
- License and permits
- Bonus and incentives
- Fines and penalties
- Facilitation payments
- Customs fees
- Int'l. payments

Penalties for Violation of FCPA Provisions

- Significant Monetary and Criminal Penalties.
  - Anti bribery 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.
Possible Collateral Consequences of FCPA Violation

• 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.

Top 20 FCPA Settlements (millions)

<table>
<thead>
<tr>
<th>Company</th>
<th>Amount (millions)</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Siemens</td>
<td>$600</td>
<td></td>
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<tr>
<td>Halliburton</td>
<td>$579</td>
<td>2005</td>
</tr>
<tr>
<td>BAE</td>
<td>$500</td>
<td></td>
</tr>
<tr>
<td>Tietex S.A.</td>
<td>$399</td>
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<tr>
<td>ENI S.p.A.</td>
<td>$365</td>
<td>2006</td>
</tr>
<tr>
<td>Technip</td>
<td>$338</td>
<td></td>
</tr>
<tr>
<td>JGC Corporation</td>
<td>$219</td>
<td>2007</td>
</tr>
<tr>
<td>Daimler</td>
<td>$186</td>
<td></td>
</tr>
<tr>
<td>Alcatel-Lucent</td>
<td>$137</td>
<td></td>
</tr>
<tr>
<td>Deutsche Telekom</td>
<td>$84</td>
<td>2008</td>
</tr>
<tr>
<td>Parajena</td>
<td>$62</td>
<td></td>
</tr>
<tr>
<td>Johnson &amp; Johnson</td>
<td>$70</td>
<td>2009</td>
</tr>
<tr>
<td>ABB</td>
<td>$58</td>
<td></td>
</tr>
<tr>
<td>Pride International</td>
<td>$56</td>
<td>2010</td>
</tr>
<tr>
<td>Michelin Corporation</td>
<td>$54</td>
<td></td>
</tr>
<tr>
<td>Baker Hughes</td>
<td>$44</td>
<td>2011</td>
</tr>
<tr>
<td>Willbros</td>
<td>$32</td>
<td>2012</td>
</tr>
<tr>
<td>Chevron</td>
<td>$30</td>
<td></td>
</tr>
<tr>
<td>Titan</td>
<td>$29</td>
<td>2013</td>
</tr>
<tr>
<td>Bridgestone</td>
<td>$28</td>
<td></td>
</tr>
</tbody>
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Enforcement Snapshot

- DOJ Actions
- SEC Actions
Key Recent FCPA Cases

- GlaxoSmithKline - Facing anticorruption investigation in China involving educational and travel expenses.
- Diebold - Violation of FCPA books and records provisions by numerous Diebold subsidiaries in China, Indonesia and Russia.
- Stryker - SEC alleges FCPA books and records violations for Stryker based upon alleged bribery violations by numerous of its subsidiaries.
- Morgan Stanley, Ralph Lauren Corporation - Received substantial credit for its stellar FCPA compliance program.
UK Bribery Act 2010

UK Bribery Act vs. FCPA
- While there are some overlaps, the UK Bribery Act has increased scope compared to the FCPA. Some US companies will need to make adjustments to the higher standards established by the UK Bribery Act:
  - **Extraterritorial jurisdiction** - triggered by almost any UK ties
  - **Not limited to public sector** - also covers commercial bribery
  - **No facilitation payment carve out**
  - **Potential debarment from government contracts** under Article 45 of the EU Public Sector Procurement Directive 2004
  - **Corporate liability provision** - corporate failure to prevent offense is crime
    - Companies with UK ties should act now to develop "adequate procedures"

Extra-Territorial Jurisdiction
- **Bribery committed anywhere in the world by any person with a "close connection" with the UK, including:**
  - British Citizen or individual ordinarily resident in UK
  - UK body corporate
  - Scottish Partnership

- **Corporate offence of failing to prevent bribery being committed by an "associated" person or company providing services anywhere in the world for and on behalf of:**
  - UK body corporate
  - Any company **carrying on a business or part of a business** in the UK
No Exception for Facilitating Payments

• But, SFO has indicated that, for now, it will be somewhat lenient in enforcement in this area.

• Will go after:
  – large repeated payments,
  – payments that are "planned for or accepted as part of a standard way of conducting business."
  – payments suggesting "active corruption" of the official to whom they were made, and
  – payments contrary to an organization's clear policy and procedures.

• Likely will be more tolerant of:
  – single small payments;
  – payments that come to light as a result of a self-reporting and remedial action, where an organization has a clear policy setting out procedures for dealing with facilitation payments and the procedures were followed; or
  – the payer was in a "vulnerable position," presumably would include serious extortion, threat of imprisonment, or risk to personal health and safety.

The New Defence: Adequate Procedures

• There is a defence to the new corporate offence if the organisation can prove that it had in place adequate procedures designed to prevent persons associated with the organisation from bribing on its behalf.

• The legal burden of proving that the defence applies is on the defendant, to be satisfied on the balance of probabilities.

Latest Trends and Issues

• Industry focus
  – Pharmaceuticals and life sciences push
    • Eli Lilly, Johnson & Johnson, Biomet, Smith and Nephew, Orthofix, Pfizer
  – Oil & gas and technology: More of the same
    • Total, Oracle, Parker Drilling, JGC, Tenaris, Tyco, Marubeni, Data Systems & Solutions, Maxwell Technologies, Deutsche Telekom
  – Financials and Insurance
    • Morgan Stanley, Direct Access Partners LLC, Allianz SE
  – Aircraft maintenance
    • Bizjet, Lufthansa, Nordham Group
  – Retailers
    • Ralph Lauren, Walmart (ongoing)
Top Eleven Current FCPA Enforcement Trends

1. Large financial penalties
2. Industry-wide sweep investigations
3. Increased prosecution of non-US companies
4. Increased prosecution of individuals
5. Expansive interpretation of “foreign official”
6. Aggressive enforcement tactics
7. Expansive legal theories and jurisdiction
8. Increased international cooperation
9. Continuing scrutiny of business combinations
10. Self-disclosure and cooperation
11. Extradition

U.S. DOJ Guidance

DOJ Principles Reinforced

- Courts and the DOJ define “Foreign Official” Broadly
- Mens Rea of the FCPA
- Parental Share Broad Responsibility for Criminal Conduct of Subsidiaries
- Disclose Liability: Significant risk of FCPA exposure
- Use of “Third Parties”. Significant risk of FCPA exposure from the actions of Third Parties
- Bank Affirmation, Defense and Exceptions Provide Narrow Grounds for Relief
- The DOJ Credits a Company’s Compliance Program; No Compliance Defense is Necessary
- Corporate Monitors: An Important Tool For Ensuring Ongoing Effective Compliance
- Compliance programs should be risk-based and industry-specific
- Remidation

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Overview: The Good

• Comprehensive, accessible review of enforcement positions and corporate compliance program expectations
• Provides additional detail on best practices in developing and maintaining a compliance program
• Useful hypotheticals provide assistance to companies on day-to-day challenges of creating, implementing, and enforcing robust corporate compliance program

Overview: The Bad

• Breaks little new ground; reaffirms prior pronouncements and policy positions in government speeches and legal briefs
• Caveat makes clear that the guidance is not binding
• Addresses general issues but does not provide clarity on many of the “challenging real life scenarios” that many companies face (e.g., CSR and donations scenarios)
• Lacks clarity on important issues such as criminal and civil distinctions in assessing parent-subsidiary liability (see Ralph Lauren case)

The Makeup of an Effective Compliance Program
Five Essential Elements of Corporate Compliance

Baker & McKenzie has distilled the key themes from the compliance program expectations of government regulators around the world into five essential elements of corporate compliance that should be present in every company’s compliance program:

- **Leadership**
- **Risk Assessment**
- **Standards and Controls**
- **Training and Communication**
- **Monitoring, Auditing and Response**

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**Essential Elements of Corporate Compliance**

<table>
<thead>
<tr>
<th>USSG’s 7 Elements of an Effective Compliance Program</th>
<th>13 Good Practices by the OECD on Internal Controls, Ethics, and Compliance</th>
<th>UK’s 6 Principle for “Adequate Procedures”</th>
</tr>
</thead>
<tbody>
<tr>
<td>Standards and procedures to prevent and detect criminal conduct.</td>
<td>Risk assessment as basis for effective internal controls and compliance program.</td>
<td>Proportionate approach to sanctions and remediation.</td>
</tr>
<tr>
<td>Leaders understand, oversee, and foster the effectiveness of the compliance program.</td>
<td>Policy that clearly and visibly states bribery is prohibited.</td>
<td>Top-level commitment.</td>
</tr>
<tr>
<td>Deny leadership positions to people who have engaged in misconduct.</td>
<td>Training - periodic, documented.</td>
<td>Top level commitment.</td>
</tr>
<tr>
<td>Constitute, document, and explain the organization’s policy on anti-bribery and anti-corruption.</td>
<td>Responsibility - individuals at all levels should be responsible for preventing, detecting and reporting criminal conduct.</td>
<td>Risk assessment.</td>
</tr>
<tr>
<td>Monitor and report on compliance.</td>
<td>Support from senior management - input, respect and value.</td>
<td>Due diligence.</td>
</tr>
<tr>
<td>Foster an environment of discipline.</td>
<td>Oversight to improve existing controls and implementation programs to address key issues.</td>
<td>Communication.</td>
</tr>
<tr>
<td>Require accountability to allegations and findings.</td>
<td>Enforcement authority and responsibility to investigate allegations and findings.</td>
<td>Monitoring and review.</td>
</tr>
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**Hallmarks of Effective Compliance Programs**

- Commitment from Senior Management and Clearly Articulated Policy
- Code of Conduct and Compliance Policies and Procedures
- Oversight, Autonomy and Resources
- Risk Assessment
- Training and Continuing Education
- Standards and Disciplinary Measures
- Third Party Due Diligence and Payments
- Continuous Improvement, Periodic Testing and Review
- Mergers and Acquisitions: Pre-Acquisition Due Diligence and Pre-Aquisition Integration

“Hallmarks of Effective Compliance Programs” from the DOJ’s 2012 FCPA Guidance

**Five Essential Elements of Corporate Compliance**

- **Leadership**
- **Risk Assessment**
- **Standards and Controls**
- **Training and Communication**
- **Monitoring, Auditing and Response**