Know When to Hold ‘Em,  
Know When to Fold ‘Em:

What Every Compliance Official  
& Business Lawyer Needs to Know About  
the Foreign Corrupt Practices Act

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The Foreign Corrupt Practices Act

- Enacted by Congress in 1977 to halt practice of bribing foreign officials.
- Two main provisions:
  - Jointly enforced by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC)
Recent Examples:

- **SIEMENS**
  - December 2008, $800 million

- **PANALPINA**
  - November 2010, $82 million

- **BAE SYSTEMS**
  - February 2010, $545 million

- **JGC CORPORATION**
  - April 2011, $218 million

- **KBR**
  - February 2009, $579 million

- **Alcatel-Lucent**
  - December 2010, $137 million

- **ALCOA**
  - January 2014, $384 million

- **Weatherford**
  - November 2013, $250 million

Vigorous Enforcement Landscape

- Since 2004, DOJ and the SEC, combined, have brought more than 300 enforcement actions against individuals and corporations. This is more than the total number of enforcement actions brought between 1977 and 2004.

- 2010 was the most prolific year in the history of FCPA enforcement. In 2011 and 2012, enforcement activity by both DOJ and the SEC was down, but still significant. 2013, however, was the second most active year on record.

- Over 150 open investigations.
Vigorous Enforcement Landscape

- In 2013, DOJ and the SEC collected a total of over $700 million in penalties. In comparison, the total amount of sanctions imposed in FCPA cases in 2010 was a staggering $1.7 billion. DOJ and the SEC, combined, collected approximately $500 million in penalties in 2011 and approximately $260 million in penalties in 2012.
- The average fine in 2013 was over $80 million.
- Since 2010, there has been a marked increase in the number of FCPA prosecutions of non-U.S. employees, perhaps as part of a broader trend to “level the playing field” and punish the individuals responsible for FCPA violations.
- Other noteworthy trends:
  - Increased government resources focused on FCPA.
  - Increase cooperation with non-U.S. governments and increased non-U.S. prosecutions.
  - Dodd-Frank Wall Street Reform and Consumer Protection Act.
  - Successor Liability/Importance of conducting pre-transactional due diligence.

U.K. Bribery Act

- Took effect July 1, 2011.
- U.S. companies that have offices or operations in the U.K. are potentially exposed to U.K. criminal prosecution for bribes occurring anywhere in the world.
- Unlike the FCPA, the U.K. Bribery Act has no exception for facilitation payments and also prohibits commercial bribery.
- It creates strict corporate liability for failure of a corporation to prevent bribery.
- It is an affirmative defense that a company had a comprehensive anti-corruption compliance program.
- Individual criminal penalties up to 10 years.
In light of increasingly vigorous enforcement of anti-bribery laws by the SEC, DOJ and the U.K. Serious Fraud Office, as well as by regulators and prosecutors in other jurisdictions, what should you do to ensure compliance and anticipate issues?

An effective FCPA compliance program includes robust due diligence concerning proposed transactions, possible acquisitions and in-country firms and individuals to be utilized by the company to seek and maintain business.

An Effective Compliance Program: Key to Internal Governance & Controls

• Compliance programs that employ a “check the box” approach are insufficient and often ineffective.
• According to DOJ’s and the SEC’s FCPA Guidance, issued in 2012, an effective compliance program usually includes:

1. A commitment from senior management and a clearly articulated policy against corruption (“Top-down”).

2. Clear, concise codes of conduct and compliance policies and procedures.

3. Individuals with authority within the company, who are independent from management and who are responsible for overseeing and implementing anti-corruption compliance.
Hallmarks of an Effective Compliance Program

4. Routine risk assessments to determine the company’s exposure to corruption.
5. Training (and re-training) of employees, agents, and other representatives.
7. Mechanisms for employees and others to report suspected or actual misconduct on a confidential basis, without fear of retaliation.
8. Periodic testing and review.

Source: www.transparency.org
FCPA “Red Flags”

- The transaction is in, or involves, a country identified as a high corruption risk.

- A sales representative or agent is involved, and they are requesting an unusually high “commission” or fee.

- The transaction involves unusual contract terms or payment arrangements, such as requests for payments in cash or “special” invoices.

- Foreign officials (or their relatives) have been entertained, or have been given gifts of any sort.

- Shell companies are being used.
FCPA “Red Flags”

- The foreign counterparty insists that a particular agent be used.
- The role or function of an agent or middle-man is unclear.
- An agent or representative will not complete FCPA certifications.
- There has been a request for a charitable donation.
- Payments are being made through third countries, without sound commercial reasons.
- Others.

Enforcement Cases in the Context of Pre-Transactional Due Diligence

- **SEC v. GE**
  The SEC’s complaint alleged that: (1) these two subsidiaries – one in Norway and the other in Italy – paid bribes in violation of the FCPA prior to their acquisition by GE (during the time these two acquired companies made the payments, they were subsidiaries of “issuers” and therefore potentially subject to SEC jurisdiction for this conduct); and (2) when GE purchased these companies and their corporate parents, it acquired both the assets and the liabilities of the acquired companies. Based solely on these allegations, the SEC alleged that GE was liable for disgorgement of the ill-gotten gains obtained by the two subsidiaries, as well as civil penalties for the FCPA books and records violations by these companies.

- **SEC v. RAE Systems** – China JV-related conduct; discovered in due diligence; failed to cease

- **SEC v. Universal Corp., Inc.** and **SEC v. Alliance One Int’l, Inc.**
  Alliance One is actually a successor company to two merged companies, Dimon and Standard Commercial. The merger took place in 2005, and the violative conduct occurred between 1996-2004. Each predecessor company made illicit payments, for which the successor company (not surprisingly) is on the hook.
Enforcement Cases in the Context of Pre-Transactional Due Diligence

- **Monsanto acquisition of Delta & Pine** – Improper payments discovered at Delta & Pine’s Turkish subsidiary during due diligence. SEC settlement with both Delta & Pine entities.
- **El Paso acquisition of Coastal Corporation** – El Paso settlement with DOJ and the SEC in connection with pre- and post-close actions of Coastal.
- **Cardinal Health acquisition of Syncor** – FCPA issues discovered in post-signing due diligence and resolved. Transaction closed.
- **Failed Lockheed/Titan acquisition** – FCPA issues arose during due diligence. Titan ultimately settled with DOJ and the SEC.
- **GE acquisition of InVision Technologies** – FCPA issues discovered during pre-closing due diligence. Transaction closed. InVision settled FCPA matter. GE entered into Letter Agreement with DOJ.
- **ABB Vetco Gray UK and ABB Vetco Gray Inc.** – Guilty pleas in connection with sale to private equity investors. Post-close, the payments allegedly continued, resulting in additional guilty pleas in connection with the sale of two Vetco Gray companies to GE.
- **Paradigm B.V. IPO** – Resolution of FCPA issues as predicate to U.S. IPO.

What Due Diligence to Conduct

- In the past decade, DOJ has issued several Opinion Procedure Releases concerning pre-transactional due diligence/remediation (03-01, 04-02, 08-01, 08-02).
- In June 2008, DOJ issued Opinion Procedure Release 08-02, which set forth due diligence measures that Halliburton would be required to follow in order to avoid FCPA liability for the activities of an acquisition target.
- The measures included a comprehensive, risk-based FCPA and anti-corruption due diligence work plan, which would address, among other things:
  - The use of agents and other third parties;
  - Commercial dealings with state-owned customers;
  - Any joint venture, teaming, or consortium arrangements;
  - Customs and immigration matters;
  - Tax matters; and
  - The need for any government licenses or permits.
- The work plan was required to organize due diligence efforts into high-risk, medium-risk, and lowest-risk elements.
What Due Diligence to Conduct

• Companies should also carefully consider whether the entity they are seeking to do business with could subject them to jurisdiction under the U.K. Bribery Act, which criminalizes commercial bribery and all facilitation payments, or any other non-U.S. anti-corruption laws.
• Uncovering evidence of anti-corruption control weaknesses, or even a violation, does not have to scuttle the deal. At a minimum, the acquiring company should:
  – Insist that the target corporation hire independent counsel to conduct a pre-acquisition internal investigation, at its expense, to determine the severity and breadth of the problem;
  – Require that any control weaknesses be remedied pre-acquisition;
  – Require that the target corporation voluntarily disclose to DOJ and the SEC pre-acquisition;
  – Insist that the target corporation create a reserve to pay any potential fines or disgorgement; and
  – Consider driving down the price of the transaction.

Failure to Conduct Adequate Due Diligence

• Failing to conduct adequate pre-transactional due diligence can have severe consequences for both companies and the transactional attorneys who represent them.
• For example...
  In June 2012, Watts Water Technologies, Inc., sued law firm Sidley Austin, which had represented Watts during its acquisition of a Chinese subsidiary in 2005. Sidley allegedly charged Watts in excess of $200,000 to vet the legal risks of the acquisition, but failed to inform Watts about the Chinese subsidiary’s written policy of paying kickbacks to Chinese government officials to secure government contracts. Allegedly, at least one Sidley lawyer has admitted that the policy was a “red flag” that potentially should have been disclosed.
• According to Watts’s complaint, it would not have moved forward with the $9 million acquisition if it had known about the written kickback policy. Watts contended that the FCPA sanctions it received in 2011 were a direct result of Sidley’s legal mistakes.
What if the company cannot gain access to all of the information it needs to conduct appropriate anti-corruption due diligence? What should it do?

Suppose the only issues uncovered are bribes paid to low-level customs officials or other ministerial officials? In other words, bribes were not paid to get or keep a contract. Beware of different treatment under the laws of different jurisdictions.


“a prosecution gone badly awry”

The FCPA Prosecution of Lindsey Manufacturing Company, Keith Lindsey & Steve Lee
Introduction
“a prosecution gone badly awry”

“In this Court’s experience, almost all of the prosecutors in the Office of the United States Attorney for this district consistently display admirable professionalism, integrity and fairness. So it is with deep regret that this Court is compelled to find that the Government team”:

“a prosecution gone badly awry”

- “Allowed a key FBI agent to testify untruthfully before the grand jury,”
- “Inserted material falsehoods into affidavits submitted to magistrate judges in support of applications for search warrants and seizure warrants,”
- “Improperly reviewed e-mail communications between one Defendant and her lawyer,”
- “Recklessly failed to comply with its discovery obligations,”
- “Posed questions to certain witnesses in violation of the Court’s rulings,”
- “Engaged in questionable behavior during closing argument,”
- “And even made misrepresentations to the Court.”
“a prosecution gone badly awry”

“The Government has acknowledged making many ‘mistakes,’ as it characterizes them. ‘Many’ indeed. So many in fact, and so varied, and occurring over so lengthy a period (between 2008 and 2011) that they add up to an unusual and extreme picture of a prosecution gone badly awry.”

Judge A. Howard Matz,

Order Granting Motion to Dismiss at 2, 5.

Trial Court’s Conclusions

• Dismissal with prejudice may be an appropriate remedy using a court’s supervisory powers where prejudice to the defendant results and the prosecutorial misconduct is flagrant

  United States v. Williams, 547 F.3d 1187, 1202 (9th Cir. 2008); United States v. Chapman, 524 F.3d 1073, 1086 (9th Cir. 2008)

• Trial Court found the Government’s misconduct to be both prejudicial and flagrant
Trial Court’s Conclusions

• Dismissal of the indictment was not based solely on misconduct before the Grand Jury

  – Precedent controlling dismissal of indictment based on misconduct in and before the Grand Jury alone is inapplicable

  – Prosecution of this case was marred by a much wider range of misconduct

Trial Court’s Conclusions

• Failure to timely disclose Agent Guernsey’s Grand Jury transcript constituted a *Brady* violation

  – Facts demonstrating a skewed or biased investigation may constitute *Brady* material that a Defendant is entitled to obtain

*Kyles v. Whitley*, 514 U.S. 419 (1995); *Carriger v. Stewart*, 132 F.3d 463, 481 (9th Cir. 1997); *United States v. Sager*, 227 F.3d 1138, 1145 (9th Cir. 2000)
Trial Court’s Conclusions

• Government’s failure to timely produce the Guernsey transcripts before opening statements was prejudicial
  – Lindsey defendants were not able to preview for jurors what they later tried to develop as a major part of their defense
  – Adversary process affected; defendants not able to contend on a level playing field
  – Lindsey Defendants not able to present crucial evidence of Grand Jury bias, warranting dismissal even before trial began; and sparing costs, travail and attendant burdens of a more than five week ordeal
  – Held: Agent Guernsey’s untruthful testimony created a “grave doubt” Grand Jury decision to indict was free from substantial influence of violations, making a pre-trial dismissal appropriate under United States v. Mechanik, 475 U.S. 66, 106 S.Ct. 938 (1986)

Trial Court’s Conclusions

• Multiple acts of misconduct undoubtedly affected the verdicts; substantially prejudiced Lindsey Defendants
• Prejudice “palpable,” assessing prosecution and trial as a whole
  – Defendants thrown off balance, forced to devote enormous effort to responding to and redressing serious and prejudicial wrongs, while at the same time having to defend themselves against the charges
  – Within only one year after the return of First Superseding Indictment – the docket had almost 700 entries, many of which consist of the motions, ex parte applications, oppositions, hearings, and rulings necessitated by the prosecution’s astonishing number of “mistakes”
Trial Court’s Conclusions

4. Government’s misconduct was flagrant

“...As for whether the Government’s misconduct was flagrant,
how could a prosecutor’s insertion of a false statement in an FBI agent’s
affidavit not be flagrant?
How could a prosecutor’s failure to detect and correct numerous
unfounded misstatements of an agent testifying under oath before a
grand jury not be flagrant?
How could the prosecution’s obtaining of privileged communications
between a Defendant and her attorney, followed by a misrepresentation
about whether the Court had approved it, not be flagrant?”

Order Granting Motion to Dismiss at 38-39.

Trial Court’s Conclusions

• A court may exercise its supervisory power:
  – To implement a remedy for the violation of a
    recognized statutory or constitutional right;
  – To preserve judicial integrity by ensuring that a
    conviction rests on appropriate considerations validly
    before a jury; and
  – To deter future illegal conduct

United States v. Chapman, 524 F.3d 1073, 1085 (9th Cir. 2008)

“All of those purposes warrant dismissal here.”

Order Granting Motion to Dismiss at 40 (emphasis added)
Trial Court’s Conclusions

“Within the period beginning in 2008 and continuing at least through June 27, 2011, the Government team committed many wrongful acts. It should not be permitted to escape the consequences of that conduct. By not allowing it to benefit from a ‘do over,’ the Court hopes that this ruling will have a valuable prophylactic effect.”

*Order Granting Motion to Dismiss* at 40.

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The Government’s Repeated Discovery Issues

- Ted Stevens trial
- Post trial issues
- Dismissal
- OPR/Individual Investigation
- Holder Announcement
- New DOJ directives
- DOJ opposes *Brady* changes

- Lindsey-Lee
- Schulke Report
- Sen. Murkowski Bill
Impact on LMC, Dr. Lindsey and Mr. Lee

“The unavoidably dry recital of the background and prosecution of this case set forth above does not fully account for the real impact of the Government’s conduct. Dr. Lindsey and Mr. Lee were put through a severe ordeal. Charges were filed against them as a result of a sloppy, incomplete and notably over-zealous investigation, an investigation that was so flawed that the Government’s lawyers tried to prevent inquiry into it. In some instances motives, statements and conduct were attributed to them that were wholly unfounded or were obtained unlawfully, such as the statements attributed to Dr. Lindsey that were suppressed because of Miranda violations and Agent’s Guernsey’s grand jury testimony that Lee “didn’t want to know” what Aguilar would do with the commission payments. The financial costs of the investigation and trial were immense, but the emotional drubbing these individuals absorbed undoubtedly was even worse. As for LMC, the very survival of that small, once highly-respected enterprise has been placed in jeopardy.”

Order Granting Motion to Dismiss at 40.