The Future of FCPA Enforcement and Compliance

Headlines from Year: Enforcement

- Overall down year in enforcement
- UK Bribery Act Force Awakens

**SEC**
- Continues FCPA enforcement program with steady stream of prosecutions/settlements
- Revising FCPA enforcement strategy – What are Clues?
- Issuance of Yates memorandum
- Promoting Compliance with Hiring of Compliance Counsel
- Encouraging Voluntary Disclosure
- Calculated press statement of focus on “High Impact” cases
- DOJ Hires Compliance Counsel
Anti-Corruption Compliance Trends

- DOJ pronouncements encouraging greater compliance efforts
- DOJ Compliance Counsel and AAG Caldwell outlined emphasis on compliance
- Compliance 2.0 – a new and evolving model pushing beyond US Sentencing Guidelines and evolving international standards
- Greater individual accountability as a result of Yates memorandum
- Spending on compliance? Some say up, some say down or stalled
- Retaliation against whistleblowers

The Numbers

- SEC: 9 Companies and 2 Individuals: $114.5 million
- DOJ: 2 Companies and 10 Individuals $24.2 million
- 7 individuals plead guilty/3 indicted
  - 1 SAP (Panama) PG
  - 3 Russian Nuclear Scheme in Maryland PG
  - 2 Berger International PG
  - 1 Siemens former CFO
- 1 IAP Worldwide
- 1 PA Consultant Scheme -- pending
- 2 PDVSA Bribery arrests -- pending

Total Corporate Fines: 2008-2015

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<th>Year</th>
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Headlines from 2015

- High profile cases remain under investigation
  - Wal-Mart, Embraer, Panasonic Avionics, Microsoft, Cisco, SAP
- Hi-Tech companies focus of enforcement
- Value of cooperation – each situation is (or can be made “unique”)
- Direct Access Partners case - 5 defendants sentences range: 24 months (2x); 36 months (1x); 48 months (2x) and Time Served (17 months)
- Petro Tiger: Siegelman Case fell apart – Siegelman and 2 cooperating defendants sentenced to probation

Focus on internal controls:
- Gifts, Meals, Entertainment and Travel
- Due diligence of third parties
- Possible readjustment of priorities between SEC and DOJ

Globalization of Anti-Corruption Enforcement

- Force Awakens – UK Bribery Act – first DPA Standard Bank and Sweet Prosecution – both under Section 7, Failure to prevent bribery
- SNC Lavalin charged in Canada for violation of Corruption of Foreign Public Officials. $47 million in bribes to Libyan government.
  - SNC Lavalin seeking DPA type resolution despite no legal authority for such a resolution.
- Mexico adopted number of anti-corruption reforms, including a National Anti-Corruption System to enforce anti-corruption laws
- China’s aggressive domestic anti-corruption enforcement continues.
  - China seeking return of fugitives from foreign countries, including US cooperation in return of several fugitives
- In Brazil, sprawling Petrobas investigation continues and impact on US companies could still occur; focus now on Texas Refinery transfer

Significant Trends for 2016

- DOJ is preparing to use its Compliance Counsel to dig into compliance plans and making determinations with respect to operations, adequacy of plans, resources, and effectiveness
- DOJ is willing to charge criminal violations for circumvention
- Due diligence, due diligence and more due diligence – establish uniform review process to ensure consistency
- Document your good faith actions to protect the company from post-violation scrutiny
- Evaluate and enhance your existing anti-corruption compliance plan
- FCPA Audits – assess and reevaluate internal controls
  - Conduct company audit of program
  - Identify 3-5 third parties for audits
  - Make sure 3rd parties are being trained and executing compliance certifications.
  - Reexamine and fine tune your travel, entertainment, gifts, meals controls and approval process
The World Has Changed

1. DOJ’s Yates Memo: Individual Prosecutions
   - “Fully leverage” its resources to identify culpable individuals
   - Civil and criminal cases
   - Applies to all areas:
     - Antitrust, FCPA, fraud, cybercrime, environmental, export control/sanctions, anti-money laundering

2. Hiring Compliance Counsel on prosecutorial team

Six Yates Memo Principles

1. To be eligible for any cooperation credit, corporations must provide DOJ with all relevant facts about individuals involved
2. Focus on individuals
3. Routine communication expected with government attorneys
4. No corporate resolution should protect any individual from criminal or civil liability
5. NO corporate resolutions without clear plan to resolve related individual cases before statute of limitations expires
6. No longer only about corporate fines – individual accountability is also focus

DOJ Criminal Division Head: Leslie Caldwell Speech

(Nov. 17)

Three important aspects for corporate cooperation

- **Self-disclosure**: companies that voluntarily disclose prior to government learning about violation, will receive maximum benefit
- **Cooperation**: full and complete, including individuals and most especially senior management
- **Remediation**: firing offenders, enhancing compliance program
New Standard: Compliance Program Metrics from Caldwell Speech

| Tone at Top: | Directors and senior managers provide strong, explicit and visible support for its corporate compliance policies? |
| Empowered Compliance Function: | Do the compliance leaders have adequate funding and resources, and sufficient authority? |
| Written Policies: | Are the company’s compliance policies clear and in writing? Easily understood? |
| Foreign languages? | Foreign languages? |
| Communications, Training and Advice: | Are compliance policies effectively communicated to all employees? Are policies easily available? |
| Are employees trained? Do they know what to do with questions? | |
| Policy Review: | Does the company review its policies and practices to keep them up to date with evolving risks and circumstances? |
| Third Parties: | Does the company train, inform and seek written assurance that third parties, vendors, suppliers and consultants understand company’s commitment to compliance? |
| Enforced: | Are there mechanisms to enforce compliance policies? Those include both incentivizing good compliance and disciplining violations. Is discipline even handed? |

Department of Justice Goals

- Increase transparency to encourage companies to voluntarily disclose violations
- Offer expectation of leniency where company satisfies 3 criteria and has effective compliance program
- Increase individual prosecutions in bribery cases
- Require companies to elevate compliance program and increase resources

Voluntary Disclosure Analysis: Changes

- More is at stake when choose to disclose to government
- DPA and NPA ONLY available in SEC enforcement action when voluntarily disclosed (new policy)
- Costs of cooperation may increase
- Internal investigations have to be re-fit into mini-prosecutors model
- Looking for individuals to hold accountable and present to DOJ

- Will this tilt the scales of justice from inception of investigation?
- Will companies that identify more individuals for prosecution receive more credit?
DOJ Hiring of Compliance Counsel – Hui Chen

- Former prosecutor and in-house Chief Compliance Officer
- Assist in evaluating compliance programs and appropriate remediation
- Four broad categories for focus:
  1. Thoughtful design of compliance program to address current risks
  2. How operational is program (not a paper program)?
  3. How well are stakeholders working with each other (Auditor, HR, Legal, CFO, CEO, Senior management)?
  4. How well is program resourced?

Case Reviews: Lessons Learned

- Bristol Meyers Squibb
- Hitachi
- BHP Billiton
- BNY Mellon
- Vicente Garcia (SAP)
- Mead Johnson
- Goodyear
- PBSJ and Hatoum
- Flir Systems
- Berger and 2 Executives
- IAP Worldwide and Executive

Bristol Meyers Squibb

- $14.6 million for FCPA violations in China
- No gifts, no prescriptions
- BMS employees used fake invoices and receipts and other sources of cash to fund bribery program
- Audit Committee was warned about potential problem and weaknesses in BMS controls in China

Four Important Reminders

- Implement a prospective pre-approved expense process (remediation 100 percent pre-approved)
- Respond to potential problems; senior managers failed to act in face of evidence
- Adequate resources needed for compliance functions offshored globally
- Respond to potential problems; senior managers failed to act in face of evidence
Hitachi

- $19 million for $10 million in bribes for $5.6 billion in power contracts in South Africa
- Filed in US District Court not an Administrative Proceeding
- Scheme was blatant – Hitachi “sold” 25 percent of African subsidiary for minimal amount to third party “front” for African National Congress (along with side success fee agreement)
- Hitachi claimed to SEC that it conducted due diligence of third party but could not produce any due diligence
- Third party and SOE and ANC had common owners and affiliations – red flags
- Third party had no experience in electricity market
- SOE recommended third party to Hitachi
- Press reports alleged bribery in bidding process but no response by Hitachi to controversy

BHP Billiton

- $22 million settlement with SEC for sponsorship of government representatives to attend Beijing 2008 Summer Olympics
- Invited 176 government officials and SOE employees; 60 (and spouses) attended at company’s expense. Total package $12k to $16k per excursion.
- Overall purpose was to promote business and “leverag[e]” relationships
- Internal control deficiencies
  - No independent legal or compliance review of applications outside business unit
  - Business managers had sole and exclusive authority to approve applications
  - Hospitality applications were inaccurate and incomplete, failed to identify person as government official (even when ongoing negotiations for mining rights)
  - Applications had cut and paste entries
  - No training on how to complete form and whether invitation complied with business code
  - No coordination with other parts of company having interactions with same individuals or entities

BNY Mellon

- $14.8 million settlement with SEC. Hiring of 3 interns to curry favor with 2 government officials from Middle Eastern sovereign wealth fund
- Ongoing Princeling investigation against six major banks
- Improper hiring practices
  - 3 recent college graduates; 2 government officials from Sovereign Wealth Fund pushed for hiring in competitive intern program – linked to important increase in BNY Mellon business
  - BNY Mellon did not meet or interview candidates; they were placed in specialized program for them; 2 interns paid higher rates and all 3 poorly performed
  - Hiring of relatives of foreign officials can be done – case boils down to circumvention of any hiring process and corrupt intent
Vicente Garcia — SAP

- SAP official plead guilty to bribing Panamanian officials to secure government technology contracts; resolved SEC case as well
- Garcia is cooperating and more charges can be expected
- Hi-Tech Sector is continuing focus for DOJ and SEC
- Bribes paid through sham contracts and false invoices, funded through discounts involving participants in channel partner distribution system
- Garcia sentenced to 22 months but possible Rule 35 motion for further reduction
- SAP may be under broader investigation

Mead Johnson

- $12 million settlement with SEC for bribes of HCPs in China at state-owned hospitals
- Payment for referrals by Chinese doctors for Mead Johnson products
- Distributors given allowance funds for marketing and funds were not properly supervised or audited to ensure proper use
- Failed internal investigation
  - 2011 internal investigation failed to uncover wrongdoing
  - Two years later, in response to SEC inquiry, and Mead Johnson discovered scheme

Goodyear

- $16 million settlement with SEC for $3.2 million in bribes in Angola and Kenya (private and state-owned companies) for tire sales
- FCPA investigation began with hotline call
  - 2 companies involved were acquired by Goodyear. Bribery scheme not discovered during due diligence before acquisition
  - Goodyear also failed to implement robust integration process
  - Goodyear good example of benefits earned from voluntary disclosure and cooperation
PBSJ and Hatoum

- PBSJ (acquired by WS Atkins) paid $3.4 million and former executive Walid Hatoum paid $50k to settle
- PBSJ provides engineering and architectural services
- Qatar SOE awarded contract to PBSJ – Hatoum funneled bribes through local company in which foreign official had ownership interest
- PBSJ participated in Morocco bidding and paid foreign official through local partner to secure contract
- PBSJ conducted no meaningful due diligence of local partners to determine ownership: no questionnaire, no work experience, or ability to perform work
- No verification of purpose of payments

Flir Systems

- $9.5 million SEC settlement
- Follow on prosecution to settlements with 2 ex-Flir sales employees at end of 2014
- Gave two Middle East government officials expensive watches and sent them on 20-day world tour to Casablanca, Dubai, Paris, New York
- 2 employees submitted false invoices and reimbursement requests
- Second string of gifts to two Saudi officials worth $40k including New Years Eve trips to Dubai along with hotel, food, drinks

Louis Berger and 2 Executives

- $17 million criminal settlement with DOJ; 2 guilty pleas from former executives and a 3-year corporate monitor
- No cooperation discount below $17-$34 million range
- FCPA violations discovered during False Claims Act investigation
- Egregiousness of crime: $3.9 million in bribes and involved higher level officials who sought to cover up conduct
- Return of the corporate monitor
IAP Worldwide & Executive Guilty Plea

- DOJ Non-Prosecution Agreement and $7.1 million penalty
- Senior executive plead guilty to FCPA violation and sentenced to 4 months
- Funneled bribes through third party to Kuwait government official
- Inflated and unjustified invoices from third party
- Executive set up shell company to bid on security contract – shell company won bid – and then won second bid as part of same project
- Executive paid $1.7 million in bribes
- Fine paid over 4 year period
- IAP Worldwide credited for voluntary disclosure, conducting extensive internal investigation and remediation.

Three Non-Compliance Events Affecting Compliance

- FIFA scandal
- Schrems Decision
- Volkswagen Emissions-Testing Scandal

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