New York Law Journal

A NEW YORK LAW JOURNAL SPECIAL SECTION

An incisivemedia publication

White-Collar Crime

WWW.NYLJ.COM

MONDAY, FEBRUARY 9, 2009

A Spiraling **Caseload** Under the Foreign Corrupt Practices Act

As actions increase in scope and geography, authorities also look closely at effectiveness of compliance programs.

BY ROGER M. WITTEN AND JAY HOLTMEIER

OVER THE PAST several years, the government has dramatically increased its efforts to enforce the Foreign Corrupt Practices Act.[1] The number of enforcement actions brought annually by the Department of Justice and Securities and Exchange Commission, which both enforce the statute, has ballooned from an average of two to four in the first 20 years of the statute's existence to more than 30 in both 2007 and 2008. Officials have stated publicly that enforcement efforts will remain active for the foreseeable future, acknowledging that there are approximately 100 cases currently under investigation. With that in mind, it is worthwhile to look at the statute and some of the key trends that are likely to play a prominent role in 2009's enforcement environment.

Increasing Financial Penalties

The FCPA consists of anti-bribery and accounting provisions. The anti-bribery provisions make it unlawful for any issuer, domestic concern, or person acting within the United States to offer or make a transfer of anything of value directly or indirectly to a foreign official, official of a public international organization, political party, party official, or any candidate for public office, for the purpose of influencing that official to assist in obtaining or retaining business. The accounting provisions require issuers, i.e., U.S. and non-U.S. companies with securities listed in U.S. trading markets, to make and keep accurate books and records and to maintain a system of adequate internal accounting controls. These accounting provisions apply to an issuer's controlled subsidiaries, including foreign entities, and apply to all kinds of corporate records, not solely those relating to corrupt payments.

> Fortunately, not all FCPA trends are cause for alarm to corporations. One positive sign is the emergence of an increasingly clear picture of what enforcement authorities consider to be the elements of a satisfactory anti-bribery compliance program.

Most investigations into corporate FCPA liability result in settlements. That trend has continued, notwithstanding that recent settlements have been characterized by a substantial increase in the size of the financial penalties imposed. Starting in 2005, total penalties in excess of $20 million became increasingly common, with Baker Hughes setting the record with $44 million in 2007. That record was shattered in December 2008, when Siemens settled with the DOJ and SEC for a range of FCPA violations occurring worldwide.[2] The settlement included a $450 million criminal fine and $350 million in disgorgement of profits. Siemens' extensive cooperation with the authorities, however, reduced the potentially $1 billion-plus penalty it might have faced otherwise. The enforcement authorities have publicly stated that large penalties in other cases are in the pipeline. While the result in Siemens may over time prove to be an outlier, the trend toward increasing penalties clearly exists even apart from that case.

The DOJ methods for calculating fines under the U.S. Sentencing Guidelines and the SEC methods for calculating civil fines, disgorgement and prejudgment interest provide significant flexibility. This factor, together with the fact that most cases are settled, results in limited visibility into the government's decision-making process. It seems clear, however, that the recent large settlements have set new standards for the government, and penalties are likely to be higher in the future than for comparable conduct in the past. This may make it more difficult for practitioners to use prior FCPA settlements as "precedent" in negotiations with the government. Another key takeaway from this trend is that it is simply no longer rational (if it ever was) to view the costs of FCPA

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compliance as too expensive in comparison to the cost of a compliance failure.

Internationalization of Enforcement

Increasingly, multinational corporations are finding themselves facing bribery investigations in multiple jurisdictions. American FCPA prosecutors have made considerable efforts in recent years to reach out to their foreign counterparts, efforts that have been matched by an increase in foreign authorities' own anti-bribery investigations.

The Siemens case again serves as an example of this internationalization of anti-bribery enforcement efforts. An investigation into improper payments and insufficient internal controls was initiated by German authorities, who raided the company's German headquarters in 2006. At the conclusion of their investigation, German authorities levied a penalty of more than €200 million against the company. The DOJ and SEC then launched their own investigations with cooperation from German authorities, resulting in $800 million in additional fines and penalties. All told, Siemens was saddled with more than $1 billion in liability in multiple jurisdictions arising from the same underlying behavior, a figure that omits the estimated $1 billion in investigative costs reportedly incurred by the company.

Siemens is illustrative, but by no means unique. Aon Limited, an insurance brokerage and provider of risk management services, was fined £5.25 million in January 2009 by the British Financial Services Authority for violating British anti-bribery and internal controls provisions.[3] The Korean Fair Trade Commission also announced fines for numerous global pharmaceutical companies on Jan. 15, 2009, for violations of Korea's unfair competition laws based on alleged improper benefits being provided to Korean healthcare providers.[4] Recent U.S. settlements in the Statoil and Akzo Nobel cases took into account penalties imposed in Norway and the Netherlands, respectively. Additionally, Indian investigators reportedly sought information from U.S. authorities relating to an SEC investigation into alleged FCPA violations by Dow Chemical.[5] These are but a few examples.

This trend toward increased international enforcement brings with it the potential for a notable increase in the cost of non-compliance, as actions brought in multiple jurisdictions give rise to new expenses and complications for the targeted company. Furthermore, as authorities in different jurisdictions increase cooperation, the likelihood of a violation in one jurisdiction leading to the investigation of violations in other jurisdictions increases exponentially.

Increase in Individual Prosecutions

Increased prosecution of individuals marks another trend in the field of FCPA enforcement. These prosecutions have led to penalties ranging from stiff fines to prison time.

Last year's investigation of former KBR chairman and CEO Albert Stanley for illicit payments made to Nigerian officials highlights this trend. Facing criminal charges and civil claims arising under the FCPA's anti-bribery provisions, Mr. Stanley pleaded guilty in September 2008.[6] He agreed to pay more than $10 million in restitution and serve 7 years in prison.

Mr. Stanley was far from the only person to be prosecuted recently under the FCPA. James Tillery, former president of Willbros International, and Paul Novak, a former consultant for Willbros, were indicted by the DOJ for violating, and conspiring to violate, the FCPA's anti-bribery provisions, among other charges.[7] The charges stemmed from alleged payments to Nigerian and Ecuadorean officials in exchange for gas pipeline contracts. Five other Willbros employees have been indicted on related charges.

Other individuals indicted for or pleading guilty to FCPA violations in 2008 and early 2009 include Martin Self, former co-owner and executive of Pacific Consolidated Industries, Mario Covino, former director of factory sales for a California-based manufacturer of service control valves, and Misao Hioki, former manager of one of Bridgestone Corporation's Japanese operations.

These prosecutions are important in at least three respects. First, of course, they highlight the significant personal, as opposed to corporate, risks for failure to comply. Second, they augur additional cost and distraction for the companies involved, because, in FCPA settlements, the companies are typically required to agree to cooperate with the government's ongoing proceedings against individuals, potentially delaying for a company and its various constituencies the time when the company can put the issues fully behind it. Third, because individuals are more likely than corporate defendants to litigate the charges against them, we may see more judicial opinions interpreting the FCPA, providing a greater and perhaps more reliable source of precedent than has been available for the statute so far.

Focus on Trouble Spots

A number of FCPA investigations recently have focused on countries, programs, and industries that the DOJ and SEC have flagged as trouble spots. Under this approach, the DOJ and SEC gain experience with a particular form of conduct or geography and then use that knowledge to pursue other defendants.

The investigations relating to kickbacks paid to the Iraqi government under the United Nations' Oil-for-Food Program are a prime example of this issue-driven approach to enforcement. Fiat just recently settled with the enforcement agencies, bringing the number of Oil-for-Food Program related cases to over a dozen.[8] Similarly, the enforcement agencies have launched several investigations into oil and oil services companies with ties to Panalpina World Transport Holding, a Swiss logistics company that allegedly made illicit payments to officials in Nigeria. In 2007, several medical device manufacturers announced that they had received inquiries from the SEC relating to possible FCPA violations. At the same time, the DOJ and SEC are increasingly focusing on corporations conducting operations in countries with reputations for corruption. Among others, China and Nigeria are repeatedly present in recent government charging papers.

While previously companies might have breathed a sigh of relief or reveled at the news of a prosecution of a competitor, such news now might more likely raise concerns that other industry participants could be next.

Internal Controls

Fortunately, not all FCPA trends are cause for alarm to corporations. One positive sign is

the emergence of an increasingly clear picture of what enforcement authorities consider to be the elements of a satisfactory anti-bribery compliance program. This picture has emerged largely through charging documents and settlement papers, where the enforcement authorities have described what does, and what does not, constitute an effective program.

Government filings clearly indicate that, in making charging and disposition decisions, the government places considerable weight on whether and to what extent a corporation had an effective pre-existing compliance program. From the government's perspective, this program should include rigorous compliance standards that reduce the prospect of violations of bribery laws. Further, these standards should be effectively communicated to all relevant individuals, and specific senior executives should be given responsibility for overseeing the compliance program. Companies also should create hotlines for the reporting of suspected violations, and those reports should be thoroughly investigated and wrongdoers should be disciplined.

Thorough pre-retention due diligence and post-retention monitoring of all agents and business partners is essential, and anti-bribery compliance clauses should be included in contracts with those parties. Companies also should establish financial and accounting procedures that ensure a system of internal controls and maintenance of accurate books, records, and accounts.

These fundamental standards have been included and refined in the government's papers in recent years. In the Siemens case, the government provided even further clarity, faulting Siemens for, among other things, failure to establish an appropriate "tone at the top" (for example, Siemens senior management "made no clear statement that Siemens would rather lose business than obtain it illegally").[9] Siemens also was faulted for failing to establish a "sufficiently empowered and competent" compliance department, with the government noting that the compliance department was understaffed in relation to the number of employees in the company, regional compliance officers had full-time duties other than their compliance duties, and there was "an inherent conflict in [the] mandate" of the compliance department because it was charged with both preventing compliance breaches and defending the company against government investigations.[10] Siemens also was alleged to have limited audit resources, resulting in an inability to adequately detect compliance failures. These pronouncements, while still general in many respects, provide substantial guidance to companies as they evaluate not only their specific compliance initiatives, but the structure of their compliance programs.

Other Trends

The trends discussed above have had great impact in the field of FCPA enforcement, but they by no means constitute an exhaustive list. The following trends cannot be discussed here in detail, but nevertheless merit attention.

First, investigations into a company's operations in a specific country are increasingly evolving into investigations of that company's global operations. More and more, investigations that appear at the outset to be limited in scope eventually become worldwide affairs.

Second, a growing number of enforcement actions are arising from voluntary disclosures. By voluntarily disclosing their own wrongdoing, corporations create a significant mitigating factor during the settlement stage, although there continues to be substantial debate in the legal and business communities as to whether the benefits of voluntary disclosure outweigh the costs.

Third, the DOJ and SEC continue to pursue an expansive view of FCPA jurisdiction, which has the potential to significantly expand the FCPA's reach in coming years. Because most corporate cases settle, DOJ/SEC positions on jurisdiction usually are not subjected to judicial review.

Fourth, the enforcement authorities are increasingly demanding that corporations appoint compliance monitors as part of their settlements. The lengths of these appointments have ranged from less than a year to four years, and these monitors represent an expensive and intrusive consequence of non-compliance.

Fifth, and finally, FCPA actions are increasingly arising in the context of mergers and acquisitions. Companies are finding themselves at risk of inheriting liability from pre-closing conduct of the seller, as well as facing exposure to liability arising from conduct within the acquired operations post-closing. M&A due diligence specifically focusing on anti-corruption issues is now a best practice.

Conclusion

These trends make clear that, as the government continues its vigorous approach to FCPA enforcement, the range of conduct and circumstances giving rise to liability is growing every year. To safely navigate this aggressive enforcement environment, companies should take more care than ever to ensure that their anti-bribery policies are thorough, clear, and communicated to their employees. Additionally, even in a difficult global economy, they must be willing to devote the time and funds necessary to develop and implement comprehensive and effective internal controls. Despite the increasing awareness of the FCPA's reach and the availability of guidance for the creation of effective compliance programs, 2009 promises to be yet another noteworthy year in the annals of FCPA enforcement.

1. 15 USC §§78m(b)(2), 78(m)(b)(3), 78dd-1 to -3, 78ff.
2. See *United States v. Siemens*, 1:08-CR-00367 (D.D.C. Dec. 12, 2008) (Sentencing Memorandum); *SEC v. Siemens*, 1:08-CV-02167 (D.D.C. Dec. 12, 2008) (Entry of Final Judgment).
3. Notice of Financial Penalty, Financial Services Authority (Jan. 6, 2009) (available at http://www.fsa.gov.uk/pubs/final/aon.pdf).
4. Choi He-suk, "FTC Fines Pharmaceutical Firms," KOREA TIMES, Jan. 16, 2008 (available at http://www.koreaherald.co.kr/NEWKHSITE/data/html_dir/2009/01/16/200901160066.asp).
5. Aasha Khosa, "CBI to Send Letter Rogatory to U.S. in Case Against Dow Subsidiary," Business Standard, May 2, 2008 (available at http://www.business-standard.com/india/storypage.php?autono=321739).
6. See Press Release, Department of Justice, "Former Officer and Director of Global Engineering and Construction Company Pleads Guilty to Foreign Bribery and Kickback Charges" (Sept. 3, 2008) (available at http://www.usdoj.gov/opa/pr/2008/September/08-crm-772.html).
7. Press Release, Department of Justice, "Former Willbros International Executive and Consultant Charged in $6 Million Foreign Bribery Conspiracy" (Dec. 19, 2008) (available at http://www.usdoj.gov/opa/pr/2008/December/08-crm-1137.html).
8. See Press Release, Department of Justice, "Fiat Agrees to $7 Million Fine in Connection With Payment of $4.4 Million in Kickbacks by Three Subsidiaries Under the U.N. Oil for Food Program" (Dec. 22, 2008) (available at http://www.usdoj.gov/opa/pr/2008/December/08-crm-1140.html).
9. See *United States v. Siemens Aktiengesellschaft*, No. 08-367 (D.D.C. Dec. 12, 2008) (Information ¶64).
10. See id. ¶87.