



Aggressive FCPA enforcement persists

Increased activity, along with recent legal developments, mandate that companies remain vigilant.

BY BETHANY HENGSBACH

Enforcement of the U.S. Foreign Corrupt Practices Act continues to increase dramatically. The U.S. government is dedicating more resources to FCPA enforcement and bringing more enforcement actions than ever before. This increased anti-corruption enforcement activity, along with recent developments in the law, mandate that private and public companies alike remain vigilant in their FCPA compliance efforts.

In recent years, the U.S. government has substantially increased the resources it dedicates to FCPA enforcement. In 2010, the U.S. Securities and Exchange Commission (SEC) opened a regional unit in San Francisco dedicated to FCPA enforcement. The FBI has also increased the number of agents dedicated to FCPA enforcement. In addition, the government has provided new incentives for private individuals to report suspected corrupt behavior. The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted in July 2010, includes a whistleblower program that rewards individuals who provide the SEC "original information" relating to an FCPA violation

with up to 30 percent of any monetary sanctions collected by the SEC in excess of \$1 million. The first wave of these cases is now making its way through the system.

The government has also signaled that it can and will use aggressive law enforcement techniques to enforce the FCPA. On Jan. 19, 2010, the FBI conducted a now-infamous raid on a trade show in Las Vegas, arresting 21 individuals. The raid followed an undercover sting operation in which FBI agents posed as officials from an African country and solicited bribes from the defendants in exchange for lucrative defense contracts. This was the first time the government had used an undercover sting to enforce the FCPA.

FCPA enforcement against individuals—a trend exemplified by the FCPA sting case—has also continued to grow. This past March, Jeffrey Tesler, a marketing consultant, pleaded guilty to violating the FCPA and agreed to forfeit nearly \$149 million for his role as a member of the TSKJ Nigeria Ltd. joint venture in a scheme to bribe Nigerian officials in exchange for construction contracts. TSKJ made payments to Tesler's Gibraltar-based shell company, purportedly for consulting services, which, in turn, Tesler channeled as bribes. Additionally, last

month, Joel Esquenazi, the former president of Terra Telecommunications Corp., was sentenced to 15 years in prison for his role in a scheme to pay bribes to officials of Telecommunications D'Haiti. Esquenazi's is the longest prison sentence ever for an FCPA violation.

Cooperation between international government agencies in enforcing anti-corruption laws, including the FCPA, is also on the rise. In early 2010, British defense industry giant BAE Systems PLC entered into a global settlement with the U.S. Department of Justice (DOJ) and the United Kingdom's Serious Fraud Office (SFO) to resolve corruption-related charges stemming from secret payments to Saudi Arabia's former U.S. ambassador in exchange for assistance in selling jet fighters to the Saudi government. Also in 2010, specialty chemical maker Innospec Inc. agreed to pay a \$14.1 million fine to settle FCPA charges with DOJ related to payments made to the Iraqi Ministry of Oil, \$2.2 million to the U.S. Office of Foreign Assets Control for violating the U.S. embargo against Cuba, and a \$12.7 million criminal fine to settle bribery charges with the SFO related to payments paid to Indonesian

officials. The SFO action began only after a referral from DOJ.

INTERPRETATION OF 'FOREIGN OFFICIAL'

The FCPA prohibits bribery of a "foreign official" for the purpose of obtaining or retaining business. 15 U.S.C. 78dd-2(a)(1). "Foreign official" is defined as "any officer or employee of a foreign government or any department, agency or instrumentality thereof." 15 U.S.C. 78dd-2(h)(2)(A). Interpretation of the term "foreign official" has been one of the most hotly litigated aspects of the FCPA.

In *U.S. v. Aguilar*, No. 2:10-cr-01031 (C.D. Calif. April 20, 2011) (order denying motion to dismiss), the U.S. District Court for the Central District of California found that whether an official of a state-owned enterprise constitutes a foreign official is a fact-intensive inquiry depending on the nature and characteristics of the entity at issue, including whether the entity provides a service to the citizens of the jurisdiction; whether the key officers and directors of the entity are government officials or appointed by government officials; whether the entity is financed through government appropriations or through revenues obtained as a result of government-mandated taxes, fees or royalties; whether the entity is vested with and exercises exclusive or controlling power to administer its designated functions; and whether the entity is widely perceived to be performing governmental functions.

Applying these factors, the *Aguilar* court concluded that officials of Mexico's state-owned utility company Comisión Federal de Electricidad could qualify as foreign officials because the company was created by statute; its governing board was made up of high-ranking government officials; it described itself as a government agency; and it performed a quintessential government function. *Id.*

RECENT NOTABLE TRIALS

The government's increased focus on individuals has led to a concomitant increase in the number of FCPA cases that go to trial. Three such trials have occurred thus far in 2011. In *Aguilar*, a jury convicted Lindsey Manufacturing Co. and two of its executives under the FCPA of bribing officials of the

Mexican company through the company's Mexican sales agent. Although DOJ offered no direct evidence that the defendants knew of the bribes, it offered evidence that the 30 percent commission paid to the sales agent was unusually high and that the executives were previously aware that the sales agent might have a corrupt relationship with the Mexican company. This was the first time a company has been convicted under the FCPA in a jury trial.

In *U.S. v. Esquenazi*, two former executives of Terra Telecommunications Corp. were convicted of violating the FCPA for paying more than \$800,000 to shell companies to be used to bribe officials at Telecommunications D'Haiti in exchange for business. Additionally, in the first trial resulting from the FCPA sting case, a mistrial was declared after the jury failed to reach a verdict after six days of deliberation. The defense stressed that the government went to great lengths during the sting operation to make the proposed transaction appear legal by, for example, never using the words "bribe" or "kickback" and assuring the defendants that the proposed transaction had been vetted by the U.S. State Department.

RECENT NOTABLE SETTLEMENTS

Recent FCPA settlements highlight the importance of establishing and implementing robust FCPA compliance programs. In January, Maxwell Technologies Inc. paid \$14 million to settle charges that its Swiss subsidiary paid \$2.5 million in kickbacks through an agent to a Chinese state-owned utility company. The SEC criticized the company's internal controls as "wholly inadequate," noting that its code of conduct included only a brief FCPA section; the company failed to conduct due diligence on the agent responsible for the payments; and the company failed to provide anti-corruption training to those involved in the payments.

In April, JGC Corp. paid \$220 million to settle charges that it was part of the TSKJ joint venture that paid intermediaries \$200 million with knowledge that at least some of the money would be used to bribe Nigerian officials in exchange for engineering and construction contracts worth \$6 billion. To date, defendants in the joint venture have

paid \$1.5 billion to settle charges. In May, Tenaris S.A. paid \$8.9 million to settle charges that it paid officials of an Uzbekistan state-controlled oil company for competitors' bid information. The SEC stated that the company's immediate self-reporting, full cooperation with the government and enhancements to its compliance program made it an appropriate candidate for the SEC's first deferred-prosecution agreement.

There are no signs that the government's increased FCPA enforcement efforts will slow down any time soon. As a result, companies should ensure that their compliance programs are up to date. Such programs should address recent FCPA developments by, for example, educating employees on who qualifies as a "foreign official," and alerting employees to the harsh penalties for FCPA violations.

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