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GOVERNMENT

FCPA: 2011 kicks off new era of anti-bribery enforcement

By Bethany Hengsbach

Taking the podium at the National Conference on the Foreign Corrupt Practices Act (FCPA) in November 2010, Assistant Attorney General Lanny Breuer declared, "We are in a new era of FCPA enforcement." This proved to be true in 2011 — a year that saw criminal FCPA trials, a number of other significant enforcement actions, and the first judicial guidance on what constitutes a "foreign official" under the statute.

There were three noteworthy FCPA criminal trials this year.

United States v. Aguilar, No. 2:10-cr-01031 (C.D. Cal.): The Department of Justice charged Lindsey Manufacturing Co. and two executives with FCPA violations. The department alleged that they had paid bribes to officials of Mexico's state-owned electric utility, Comision Federal de Electricidad (CFE), through sales representative Enrique Aguilar, in exchange for contracts. The prosecution offered no direct evidence that the defendants knew of the bribes. Instead, it relied heavily on the fact that: the 30 percent commission paid to Aguilar was significantly higher than the commission earned by his predecessor sales representative; and the executives were aware when they hired Aguilar that he had a corrupt relationship with a CFE official in years past. A jury convicted the defendants of conspiracy to violate the FCPA and substantive FCPA violations on May 10.

On Dec. 1, the court vacated the convictions and dismissed the indictment with prejudice due to prosecutorial misconduct. Among other things, the court found that the government allowed an FBI agent to give misleading testimony before the grand jury, lied to obtain search warrants, reviewed emails that were clearly privileged, and failed to timely provide the defendants with an FBI agent's full grand jury testimony.

The full impact of the dismissal and the court's harsh rebuke of the prosecution remain to be seen, but *Aguilar* is nonetheless significant because it offers guidance on what constitutes a "foreign official" for purposes of the FCPA. Ruling on the defendants' motion to dismiss, the court explained that the following factors should be considered in determining whether an agent of an entity constitutes a foreign official: whether key officers and directors of the entity are government officials or appointed by government officials, whether the entity is financed through government appropriations or revenues, whether the entity has exclusive power to administer its designated functions,

and whether the entity performs a governmental function.

United States v. Goncalves, No. 09-cr-00335 (D.D.C.): In January 2010, the FBI raided the Shooting, Hunting, Outdoor Trade Show in Las Vegas and arrested 22 individuals following an undercover sting operation in which agents posed as officials from an African country and solicited \$1.5 billion in bribes in exchange for defense contracts worth \$15 billion. *Goncalves*, the first trial arising out of these arrests, ended in a mistrial on July 7 after the jury failed to reach a verdict. Arguably, the jury was swayed by evidence that the undercover agents went to great lengths to convince the defendants that the bribery scheme was above-board. For example, the government avoided words such as "bribe" and "kickback" throughout the operation, and assured the defendants that the transaction had been vetted by the U.S. State Department. The second trial arising out of this raid began on Sept. 26.

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United States v. Esquenazi, No. 1:09-cr-21010 (S.D. Fla.): The Justice Department charged two former executives of Terra Telecommunications Corp. for funneling money to various shell companies to be used to bribe officials at Telecommunications D'Haiti in exchange for favorable business treatment. On Aug. 5, defendants were convicted of conspiracy to violate the FCPA, substantive FCPA violations, and money laundering. Significantly, one defendant was sentenced to 15 years in prison — the longest prison sentence in FCPA history.

On the enforcement front, the following ranked on top: On April 6, JGC Corp. paid \$220 million to settle FCPA charges levied by the Justice Department. JGC was part of a Nigerian joint venture that allegedly paid \$200 million to intermediaries knowing that the money would be used to bribe Nigerian officials in exchange for engineering and construction contracts worth \$6 billion.

The very next day, Comverse Technology, Inc. paid \$2.8 million to settle FCPA charges levied by the Justice Department and the Securities and Exchange Commission. Comverse's Israeli subsidiary allegedly bribed individuals connected to Hellenic Telecommunications Organization,

a Greek telecommunications provider in which the Greek government holds only a one-third interest.

The government also obtained \$77 million and \$60 million FCPA settlements with Johnson & Johnson and Pfizer, respectively. Johnson & Johnson subsidiaries allegedly paid public health providers in Eastern Europe to induce the purchase of its medical devices, and paid kickbacks to Iraqi officials in exchange for Oil for Food contracts. Similarly, Pfizer admitted to making "improper payments" to persons outside the U.S. to increase its pharmaceutical sales abroad.

Notwithstanding these hefty settlements, the government maintains that a company's internal controls, self-reporting of violations, and cooperation can reduce its FCPA liability. Bridgestone Corp.'s Sept. 15 settlement with the Justice Department for \$28 million serves as an example. Bridgestone was charged with conspiring to make corrupt payments to government officials in various Latin American countries to obtain and retain business. The company voluntarily conducted a worldwide internal investigation, made employees available for government interviews, and provided voluminous evidence to the government. In addition, Bridgestone undertook extensive remediation efforts, including restructuring the relevant parts of its business, terminating many of its third-party agents, and taking disciplinary action against the employees responsible for the corrupt payments. As a result, the Justice Department recommended that Bridgestone's fine be substantially reduced.

These developments highlight the continued need for rigorous FCPA compliance programs that include, among other elements, clear policies, standards, and procedures designed to reduce the prospect of FCPA violations, and oversight of agents and business partners. Given the volatility of the legal landscape, prevention and education may be the most effective ways for businesses to minimize their anti-corruption exposure.

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