

Government Contracts Blog

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A New Approach To FCPA Enforcement - Can The FCA Be Far Behind?

2010 is promising to be a banner year for enforcement of the Foreign Corrupt Practices Act ("FCPA"). In mid-January of this year, the DOJ unsealed sixteen indictments [charging twenty-two individuals](#) with violations of the FCPA's anti-bribery provisions. A few weeks later, in early February, British defense industry giant, BAE Systems plc ("BAE"), announced that it would plead guilty to one charge of conspiring to make false statements to the U.S. Government regarding its ongoing compliance with the FCPA. In connection with its guilty plea, BAE also agreed to pay a \$400 million penalty. Notably, the DOJ did not allege that BAE violated the FCPA or that BAE executives willfully looked the other way while their agents or subordinates violated the Act. Instead, the crux of the DOJ's case appears to be that BAE failed to install a compliance system capable of detecting FCPA violations in the first place.

On February 5, 2010, less than three weeks after the DOJ announced the results of its now-infamous FCPA sting operation, BAE publicized two plea agreements it had reached with the DOJ and the U.K. Serious Fraud Office. BAE stated that, pursuant to an agreement with the DOJ, it would plead guilty, pay a \$400 million fine, and "make additional commitments concerning its ongoing compliance" in order to settle a charge of conspiring to make false statements to the U.S. Government "in connection with certain regulatory filings and undertakings." According to the charging documents filed in the U.S. District Court for the District of Columbia, the charge against BAE arose from BAE's failure to honor a ten-year old promise to comply with the FCPA.

In 2000, BAE's Chief Executive wrote a letter to the U.S. Secretary of Defense, affirming that BAE and its affiliates were committed to complying with the anti-bribery provisions of the FCPA whether or not those provisions in fact applied to them. BAE's commitment included a promise to develop and implement robust FCPA compliance systems. However, the DOJ later learned that, both before and after sending its letter, BAE had made several substantial payments under conditions indicating a "high probability that part of the payments would be used [to bribe foreign officials]."

The facts recited in the charging documents support at least a suspicion that certain intermediaries used funds received from BAE to make improper payments. For example, BAE allegedly made payments of well over \$100 million to so-called "marketing advisors," who ostensibly assisted BAE to secure procurement contracts with foreign officials, but whose

contracts with BAE "were maintained by secretive legal trusts in offshore locations." According to the DOJ, "[i]n many instances, [BAE] possessed no adequate evidence that its advisors performed legitimate activities to justify the receipt of substantial payments." Moreover, BAE allegedly sought to conceal its relationships with its marketing advisors by channeling contracts and payments through a complex web of offshore holding companies.

The charging documents also claim that BAE funneled significant funds to unidentified individuals to help secure contracts to provide military aircraft to the governments of the Czech Republic, Hungary, and Saudi Arabia. As with the payments to marketing advisors, BAE's payments to the unidentified individuals also occurred under suspicious circumstances. For example, the charging documents alleges that BAE paid over £19 million to a marketing advisor and entities he controlled for his assistance setting up aircraft leasing deals with the Czech Republic and Hungary. The charging documents go on to imply that the advisor used at least some of the money to convince the Hungarian government to reverse a previous decision awarding a contract in favor of an unidentified U.S. contractor and instead to award the contract in favor of BAE.

BAE's plea agreement provides yet another example of how enforcement of the FCPA is increasingly a multinational enterprise, and that international cooperation to detect and prevent foreign bribery is increasingly becoming the norm. The BAE investigation began in Britain, and was spearheaded by British officials. And in January, London police executed seven search warrants in connection with the FCPA sting operation arrests.

More importantly, the BAE plea agreement demonstrates the DOJ's ongoing commitment to aggressively crackdown not only on foreign bribery, but also on behavior that smells like it. The DOJ stopped short of alleging that BAE's payments violated the FCPA. Rather, the DOJ focused on BAE's failure to subject the payments "to the type of internal scrutiny and review" necessary to determine whether they violated the FCPA despite BAE's promise to implement a robust compliance program. According to the charging documents, BAE neglected to enforce specific FCPA compliance directives, maintained inadequate information on its intermediaries and their activities, and failed to meaningfully review or verify payments to intermediaries and foreign officials. The DOJ claims that BAE's promise to comply with the FCPA "impaired and impeded the activities and lawful functions of the [DOD]," by dissuading the U.S. Government from keeping a closer watch on BAE's business transactions. Thus, the crux of the charging documents is that BAE falsely promised to comply with the FCPA and but for BAE's false promise, the government "could have commissioned further investigations and could have imposed appropriate remedies to satisfy their concerns."

The net takeaway here appears to be that companies cannot rely on promises of compliance and self-policing to avoid drawing attention from the DOJ. Of course, the DOJ may have been motivated to pursue BAE by more than just BAE's broken promise. It probably did not help BAE's case that it had engaged in suspicious business practices for years before and after it promised, but failed, to rein in its behavior. Likewise, BAE surely did not benefit from the appearance (at least) that it orchestrated a series of transactions that led to it winning business that had initially been awarded to a U.S. company. Regardless of the government's motivation, this case demonstrates once again that tenacious FCPA enforcement by the DOJ is here to stay.

The BAE plea agreement raises interesting – and troubling – questions outside of the FCPA realm. Recent revisions to the Federal Acquisition Regulation impose contractual obligations relating to codes of conduct, complete with business ethics awareness programs and internal controls that exhibit certain delineated characteristics. FAR 52.203-13. See previous coverage [here](#), [here](#), [here](#), and [here](#). Query – does BAE presage a new era in enforcement in which the Government foregoes proof of any substantive offense and merely “strong arms” the contractor into a handsome civil False Claims Act settlement for having (a) inadequately implemented those compliance and control programs and (b) impliedly warranted in its payment requests (and falsely so) compliance with its contractual obligations? Don’t bet against it.

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