THE REVIEW OF
SECURITIES & COMMODITIES REGULATION
AN ANALYSIS OF CURRENT LAWS AND REGULATIONS AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 45 No. 15 September 12, 2012

THE TIME HAS COME TO RECONSIDER THE *GUTFREUND* STANDARD

Under the Gutfruend *standard, a legal or compliance professional can be held responsible as a supervisor if he has the "responsibility, ability, or authority" to affect the conduct of the employee at issue. This subjective standard, the author argues, has failed in its fundamental purpose of providing legal clarity to the law of supervision. A better reading of* Gutfruend*, he believes, would be to treat the standard as defining the membership of the control group in collective decision-making and to use control as the essence of supervision in future cases.*

By John H. Walsh *

The *Gutfreund* standard has failed. More precisely, the definition of a supervisor set out in the *Gutfreund* order has worked in conventional settings, where almost any reasonable definition would have sufficed, and failed in those difficult settings, where an effective legal standard was most needed. Efforts to apply the *Gutfreund* standard to difficult facts have led to incoherent results, creating uncertainty on the very question the standard was intended to resolve: when is a legal or compliance official a supervisor?

This article suggests that it is time to reconsider the *Gutfreund* standard. Part I reviews the order of the Securities and Exchange Commission that gave rise to the standard: *In re Gutfreund*.[1] Part II discusses how the definition of a supervisor set out in the order has been applied, and its incoherence when applied to legal and compliance professionals. Part III proposes a new reading of *Gutfreund* and its standard. Finally, in Part IV, the article concludes by recommending several specific policy goals that could help move forward from the confusion caused by the current standard.

I. IN THE MATTER OF *JOHN H. GUTFREUND*

In April 1991, three senior executives of a registered broker-dealer, the Chairman and CEO ("CEO"), John H. Gutfreund; the President; and the Vice Chairman in charge of fixed income trading, were informed that the head of the firm's Government Trading Desk had submitted a false bid in a U.S. Treasury auction.[2] A few

[1] *In re Gutfreund*, Exch. Act Rel. No. 34-31554, 51 SEC 93 (Dec. 3, 1992).

[2] *Id*. at 95.

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RSCR Publications LLC Published 22 times a year by RSCR Publications LLC. Executive and Editorial Offices, 2628 Broadway, Suite 29A, New York, NY 10025-5055. Subscription rates: $1,197 per year in U.S., Canada, and Mexico; $1,262 elsewhere (air mail delivered). A 15% discount is available for qualified academic libraries and full-time teachers. For subscription information and customer service call (866) 425-1171 or visit our Web site at www.rscrpubs.com. General Editor: Michael O. Finkelstein; tel. 212-876-1715; e-mail mofinkelstein@hotmail.com. Associate Editor: Sarah Strauss Himmelfarb; tel. 301-294-6233; e-mail shimmelfarb@comcast.net. To submit a manuscript for publication contact Ms. Himmelfarb. Copyright © 2012 by RSCR Publications LLC. ISSN: 0884-2426. Reproduction in whole or in part prohibited except by permission. All rights reserved. Information has been obtained by *The Review of Securities & Commodities Regulation* from sources believed to be reliable. However, because of the possibility of human or mechanical error by our sources, *The Review of Securities & Commodities Regulation* does not guarantee the accuracy, adequacy, or completeness of any information and is not responsible for any errors or omissions, or for the results obtained from the use of such information.

days after learning of the false bid, the executives met in the CEO's office. The Vice Chairman summarized the situation, indicated that he believed the incident was an aberration, and expressed his hope it did not end the career of the head of the trading desk. The broker-dealer's Chief Legal Officer – Donald M. Feuerstein -- also attended the meeting, and told the group that submission of the false bid was a criminal act, and, while there was no duty to do so, they had no choice but to report the matter to the government. The group then discussed where and how to report the matter, and concluded that the preferable approach would be to report it to the Federal Reserve Bank of New York. The meeting then ended.

At the conclusion of the meeting, each of the four executives apparently believed that a decision had been made that the CEO or President would report the false bid to the government, although each had a different understanding of how the report would be handled.[3] However, there had been no discussion during the meeting about investigating what the head of the trading desk had done, disciplining him, or placing limits on his activities. Each of the four executives placed the responsibility for investigating and responding to the conduct on one or more of the other participants in the meeting. The matter was not reported to the government and no limits were placed on the head of the trading desk for some months. During that period of time, he submitted additional unauthorized bids.

When the false bids came to the attention of the SEC, it brought an enforcement action against the four executives who had participated in the meeting.[4] The SEC noted that each of the three line executives – CEO, President, and Vice Chairman – apparently believed that someone else would take the supervisory action necessary to respond to the conduct on the trading desk. They did not discuss what action would be taken or who would be responsible for it. Instead, each of the supervisors assumed that another would act. As a result, the SEC concluded, "although there may be varying degrees of responsibility, each of the supervisors bears some measure of responsibility for the collective failure of the group to take action."[5] The SEC sanctioned all three for failure to supervise.

The SEC included the firm's Chief Legal Officer in the proceeding, although, recognizing that he was not a direct supervisor of the trader, it did so by way of a report of investigation.[6] The SEC's order said:

> Employees of brokerage firms who have legal or compliance responsibilities do not become "supervisors" … solely because they occupy those positions. Rather, determining if a particular person is a "supervisor" depends on whether, under the facts and circumstances of a particular case, that person has a requisite degree of responsibility, ability, or authority to affect the conduct of the employee whose behavior is at issue.[7]

The SEC went on to say that given the Chief Legal Officer's "role and influence within the firm[,]" he shared in the responsibility to take appropriate action.[8] It was not sufficient to be a mere bystander to the events. In other words, once involved in formulating management's response to the problem, the Chief Legal Officer should have either discharged those supervisory responsibilities himself or known that others were taking appropriate action.

II. THE "RESPONSIBILITY, ABILITY, OR AUTHORITY" STANDARD IN ACTION

The legal community immediately recognized that the *Gutfreund* order was a major statement by the

[3] *Id.* at 99-100.

[4] *Id* at 106-07. The SEC also brought enforcement actions against the broker-dealer and its parent company. *Id.* at 107.

[5] *Id.* at 110.

[6] *Id.* at 113. As a report of investigation, no disciplinary action was taken against him.

[7] *Id.*

[8] *Id.*

Commission on supervisory responsibilities.[9] Nonetheless, as a settled order, it had questionable precedential value, and litigants challenged its application.[10] In 2002, the SEC appears to have resolved the status of the order when it upheld its precedential value, even in regards to conduct that had predated its issuance.[11] An Administrative Law Judge[12] later noted, in 2010, that the case and its 'responsibility, ability, or authority' standard had been referenced many times by the Commission in litigated cases.[13] Indeed, the SEC has cited to its use of *Gutfreund* in at least one other context, as standing for the proposition that the Commission may use an opinion issued in connection with a settlement to state views that it would apply in other contexts.[14]

In most litigated cases, application of the standard appears to have been relatively straightforward. The definition of a supervisor set out in *Gutfreund* has been used when analyzing: whether a broker-dealer branch manager was a supervisor;[15] the scope of a branch manager's supervisory authority;[16] whether a regional sales manager was a supervisor because of his responsibility to implement certain special supervisory procedures;[17] and whether a metropolitan area manager was a supervisor of the personnel in branch offices over which he had "direct supervisory authority."[18] The *Gutfreund* standard has also been cited in several settled cases. Many of these cases also appear relatively straightforward. They included: a finding that a firm's director of Global Research and director of U.S. Equity Research supervised one of the firm's research analysts;[19] and a finding that a portfolio manager supervised the person responsible for executing portfolio trades.[20]

In all of these cases the formulation of the standard of supervisory responsibility was probably not a significant issue. One can easily imagine all of these cases being resolved on the basis of a standard that two Commissioners had articulated in a case, *In re Huff*, decided the year before the *Gutfreund* order.[21] The two commissioners had said: "In our view the most probative factor that would indicate whether a person is responsible for the actions of another is whether that person has the power to control the other's conduct. … Control … is the essence of supervision."[22] Some cases continued to articulate a control standard, even after issuance of the *Gutfreund* order, in addition to the *Gutfreund* standard,[23] or as a statement of the meaning of the *Gutfreund* standard.[24] Indeed, then-Commissioner Schapiro, who joined the concurring opinion in *Huff* and was on the Commission when it issued the *Gutfreund* order, said that she believed both cases: "display a

[9] *See, e.g.*, James R. Doty, *Regulatory Expectations Regarding the Conduct of Attorneys in the Enforcement of the Federal Securities Laws: Recent Development and Lessons for the Future*, 48 BUS. LAW. 1543 (1993) (stating that the private bar had a "lively concern" about what the decision "portends for lawyers generally").

[10] *See, e.g.*, *In re Kolar*, Exch. Act Rel. No. 34-46127, 77 SEC Docket 2944 (June 26, 2002) (discussing challenge to authority of *Gutfreund* as a settled decision).

[11] *Id.* at 2949.

[12] Litigated administrative proceedings before the SEC are generally heard before Administrative Law Judges, with appeal available to the Commission (meaning, in this context, the five Commissioners), and ultimately, from the Commission to a United States Court of Appeals.

[13] *In re Prime Capital Services*, Initial Decision, 2010 WL 2546835, *43 n.40 (SEC Rel. No. 398) (ALJ June 25, 2010).

[14] *In re SIG Specialists*, Exch. Act Rel. No. 34-51867, 85 SEC Docket 2060 (June 17, 2005).

[15] *In re Pasztor*, Exch. Act Rel. No. 34-42008, 70 SEC Docket 1979, 1983 n.27 (October 14, 1999).

[16] *In re Logay*, Initial Decision, 2000 WL 95098, *13 (SEC Rel. No. 159.) (ALJ January 28, 2000).

[17] *In re Muth*, Exch. Act Rel. No. 33-8622, 86 SEC 972 (October 3, 2005).

[18] *In re Kolar*, Exch. Act Rel. No. 34-46127, 77 SEC Docket 2944 (June 26, 2002).

[19] *In re Hoffman*, Exch. Act Rel. No. 34-51713, 85 SEC Docket 1243, Invest. Comp. Act Rel. No. 2386 (May 19, 2005).

[20] *In re Fanam* Capital, Invest. Co. Act Rel. No. IA-2316, 84 SEC Docket 228 (October 29, 2004).

[21] *In re Huff*, Exch. Act Rel. No. 34-29017, 50 SEC 524, 530 (March 28, 1991) (Shapiro & Lochner, Comm'rs, concurring). In this case a unanimous Commission dismissed the proceeding against Huff, but two Commissioners did so on the basis that Huff had supervised reasonably, and two (Commissioners Schapiro and Lochner) on the basis that Huff was not a supervisor. The latter portion of the opinion set out the definition of a supervisor discussed in the text. *Id*.

[22] *Id.* at 532.

[23] *In re Raymond James Financial*, Initial Decision, 86 SEC 604 (SEC Rel. No. 296) (ALJ September 15, 2005 (citing *Huff* and *Gutfreund*)), *aff'd without appeal*.

[24] *In re Dornfeld*, Exch. Act Rel. No. 34-55209, 89 SEC 2792 (January 31, 2007).

consistent emphasis on authority, responsibility, and control, as the hallmarks of a 'supervisor.'"[25]

In sum, the *Gutfreund* standard has generally been used in conventional settings where a control standard would probably have been equally effective. However, these situations were not the purpose for which it was articulated. As noted above, the standard was intended to determine when legal and compliance personnel were supervisors. Some cases have continued to describe the *Gutfreund* standard in such specialized terms. For example, one recent case opined that direct supervisors are presumed to be supervisors, "while a compliance officer must be shown to have the responsibility, ability, and authority to affect the conduct of an employee" to be considered his or her supervisor.[26]

This raises the question: how has the *Gutfreund* standard functioned in this, its core mission? Some insight can be gained from the ALJ's analysis in a recently litigated case, *In re Theodore Urban*.[27] The staff alleged that Urban, a broker-dealer's General Counsel and head of compliance, was a supervisor.[28] While an evenly divided Commission eventually dismissed the proceeding on appeal,[29] the ALJ's analysis highlights how the *Gutfreund* standard works in practice.[30]

The ALJ described the question: when are legal and compliance officials supervisors even though they do not have any of the traditional powers associated with supervision?[31] The ALJ's analysis is worth quoting: "As General Counsel, Urban's opinions on legal and compliance issues were viewed as authoritative and his recommendations were generally followed by people in [the firm's] business units, but not by Retail Sales."[32] This last caveat was significant, because the offending salesman worked in Retail Sales and the head of Retail Sales declined to follow Urban's recommendation to terminate the salesman. This factual predicate – Urban's opinions were viewed as authoritative and his recommendations were generally followed, but in this case they were not – poses an interesting analytical problem.

At the threshold, it is worth noting that the ALJ's focus on opinions and recommendations was consistent with the *Gutfreund* standard. In the *Gutfreund* order, the Commission had noted the Chief Legal Officer's role and influence within the firm. The authoritativeness of Urban's opinions would be indicative of his role and influence. Similarly, the ALJ's consideration of whether Urban's recommendations were generally followed was also consistent with the *Gutfreund* standard. In the *Gutfreund* order, the Commission had noted that the Chief Legal Officer had made recommendations in the past and management had relied upon him.[33] Moreover, another ALJ had taken a similar view earlier in 2010, noting in his Initial Decision, *In re Prime Capital Services*, that: "the record does not contain evidence that any of [the Chief Compliance Officer's] recommendations were ignored or refused."[34] In short, the ALJ's reasoning in *Urban* is a fair test for the *Gutfreund* standard. Let us take each element in turn.

The first element, how people viewed Urban's opinions, illustrates the essential nature of the "authority" test under the *Gutfreund* standard, its subjectivity. How someone views someone else's opinion is by its nature subjective. It also raises the question: how does one prove these views in evidence? Are some views more authoritative than others? What happens when there is a conflict, with different people

[25] Mary L. Schapiro, SEC Commissioner, Speech at SIA Compliance and Legal Seminar, Broker-Dealer Failure to Supervise: Determining Who is a Supervisor, SIA Compliance and Legal Seminar (March 24, 1993) (transcript *available at* www.sec.gov/news/speech/1993/032493schapiro.pdf).

[26] *In re Prime Capital Services*, Initial Decision, 2010 WL 2546835, *43 (SEC Rel. No. 398) (ALJ June 25, 2010).

[27] *In re Urban*, Initial Decision, 99 SEC Docket 994 (SEC Release No. 402) (ALJ September 8, 2010), *proceeding dismissed by an evenly divided Commission,* Exch. Act Rel. No. 34-66259, 2012 WL 1024025 (ALJ January 26, 2012).

[28] *Id*.

[29] *Id.*

[30] The author wishes to note that as a member of the staff of the SEC at the time of the proceeding against Urban, he played a small role in the staff's case. The author also wishes to emphasize that this article does not seek to revisit the underlying issues presented in the case, such as whether Urban should have been held liable. Rather, the purpose is to highlight the analytical difficulties – for potential respondents and regulators alike – created by the *Gutfreund* standard as it is currently understood.

[31] *In re Urban*, Initial Decision, 99 SEC Docket 994 (SEC Rel. No. 402) (ALJ September 8, 2010), *proceeding dismissed by an evenly divided Commission,* Exch. Act Rel. No. 34-66259, 2012 WL 1024025 (ALJ January 26, 2012).

[32] *Urban*, 2012 WL 1024025 at *44 (2010).

[33] *In re Gutfreund*, Exch. Act Rel. No. 34-31554, 51 SEC 93, 112 (Dec. 3, 1992).

[34] *In re Prime Capital Services*, Initial Decision, 2010 WL 2546835, *45 (SEC Rel. No. 398) (ALJ June 25, 2010).

having different views? Most fundamentally, the idea that a legal or compliance official becomes a supervisor because of someone else's subjective view, is difficult to square with any common understanding of supervision.

The second element, whether Urban's recommendations were accepted, appears more objective. Proof of recommendations and whether or not they were followed can be introduced into evidence, assessed, and tested. The ALJ in the *Prime Capital Services* case, cited above, who was searching the record for evidence of ignored or refused recommendations, appears to have been working in this direction. Even so, this does not free the *Gutfreund* standard from its subjectivity. The idea that legal or compliance officials become supervisors when their recommendations are accepted leaves the decisive action within the other persons' subjective control: do they choose to follow? Again, most fundamentally, the idea that a legal or compliance official becomes a supervisor because of someone else's subjective decision to follow, is difficult to square with any common understanding of supervision.

While the ALJ in the *Urban* case stated these two activities separately – viewing opinions and following recommendations – as a practical matter, they mean much the same thing. One's recommendations are followed because one's opinions are viewed as authoritative, and vice versa. Moreover, both of these activities, viewing and following, arise from the same subjective source: the perceptions and choices of others at the firm. Following the reasoning to its logical conclusion, the better one's opinions, the more authoritative one appears, and the more others choose to follow, the more likely one will be a supervisor and potentially liable. This is an odd reversal of the usual understanding that a failure to supervise is a failure. Indeed, in this case, the head of Retail Sales failed to follow Urban's recommendation.

This is the crux of the problem. If the standard is based on people viewing opinions as authoritative and following recommendations, what happens when they do not? In the *Urban* case, the ALJ concluded that Urban was a supervisor. Indeed, she said, "the language in *Gutfreund*, taken literally, would result in [the person who engaged in misconduct] having many supervisors because many people at the [firm] acted to affect [his] conduct in a variety of different ways."[35] This suggests that legal and compliance professionals are supervisors of anyone whose conduct they can affect in any way.

[35] *Urban*, 2012 WL 1024025 at *44 (2010).

The limiting principle for this status is difficult to discern. The ALJ in the *Urban* case gave a hint of its open-ended scope when she asked what further action Urban should have undertaken to fulfill his supervisory responsibilities. The ALJ answered: nothing. The ALJ found that approaching the CEO (to whom Urban was a direct-report) or Board of Directors (of which Urban was a member) would have been futile.[36]

This analysis leads to a state of extreme incoherence. A legal and compliance official has authority and is a supervisor because his opinions are authoritative and recommendations are followed. Yet no further action was required because additional recommendations would have been futile, from which we can presume they would not have been authoritative. In other words, legal and compliance officials are supervisors when they are authoritative, and even when they are not.

At the end of the day, application of the *Gutfreund* standard leaves one at a loss as to what makes a legal or compliance official a supervisor. In practice, application of *Gutfreund's* "authority" test appears to be based on a subjective assessment of an individual's general role and influence within the firm. This subjectivity should concern regulators as well as legal and compliance officials. In the *Urban* case, the potential responsibility of a senior executive of a regulated firm, who had been deeply involved in addressing a serious compliance problem and was a member of more than one governance committee, was decided based on the ALJ's speculation about the likely authoritativeness of recommendations that were not made. While this opinion was later rendered moot, it demonstrates the weakness of the *Gutfreund* standard's subjective approach. There must be a better way to make this determination.

III. *GUTFREUND* RECONSIDERED

When we return to the *Gutfreund* order and ask if its current incoherence was inherent in the original decision, we make an interesting discovery. The *Gutfreund* standard is actually quite reasonable when applied to the facts of that case. This is because its facts and circumstances have been largely forgotten. The *Gutfreund* case was a matter of collective, not individual, responsibility.

[36] Again, please *see* note 30 *supra*, the author states no view on the merits of the ALJ's findings. Rather, taking the findings as a given, the question is: does analysis pursuant to the *Gutfreund* standard make sense?

In the *Gutfreund* case, the four responsible executives met; discussed the problem; failed to address critical issues – such as investigating the conduct and preventing a recurrence; adjourned; and then did nothing further, each assuming that someone else would undertake the appropriate actions. In its order, the SEC highlighted the collective nature of this failure. It was, the Commission said, a collective failure of the group, and, while there were varying levels of responsibility for each of the participants, all shared in that collective failure. When we turn to the report of investigation involving the Chief Legal Officer, we find that his failure was similar: once he became part of management's collective response to the problem – *i.e.*, once he was a member of the control group – he shared in the collective responsibility to see that appropriate action was taken.[37]

In light of these facts and circumstances, the *Gutfreund* standard takes on a new meaning. It is not based on a subjective assessment of an individual's general authoritativeness within the firm, regardless of the present circumstances. Rather, it is based on a specific collective or institutional setting. At its origin, the *Gutfreund* standard applied to a defined group that was meeting to address a defined question. The standard articulated in the order addressed the question: who among the participants shared in the group's control over the problem? This gives the definitional standard a specific content. A junior official entering the meeting to deliver a report or spreadsheet would not have the necessary role or influence; while a senior executive opining on the proper course of action for the firm very well could. Viewed as a standard for defining who belonged to the control group in a particular meeting regarding a particular problem, the *Gutfreund* standard makes sense.

IV. CONCLUSION

How do we move forward from the obvious confusion caused by the current application of the *Gutfreund* standard? Set out below are five policy goals that should be considered.

First, we should recognize that the *Gutfreund* standard as it is currently understood is a failure. The Commission's dismissal of the *Urban* proceeding does not resolve the analytical problems it revealed. Most importantly, the standard has failed in its fundamental purpose: providing legal clarity to the affected population so it can determine whether or not it is subject to the law of supervision. Regulators, as well as legal and compliance officials, should be concerned about a subjective standard that leads to such incoherent and speculative analyses.

Second, we should read the language of *Gutfreund* as a specialized standard applicable only to group responsibility. This resolves many of the analytical concerns discussed above. It grounds the analysis in a concrete institutional setting and asks a specific question: who is a member of the identified control group? In addition, the need for such an analytical tool is growing. Collective decision-making has spread across the financial sector, with compliance committees, risk committees, valuation committees, and numerous other institutionalized activities. In many cases, the traditional view of supervision – one supervisor and one supervisee – is obsolete. The *Gutfreund* standard, properly understood, is a timely answer to this development.

Third, having narrowed the *Gutfreund* standard to its original facts and circumstances, we should resume our search for an effective definition of when legal and compliance officials become supervisors. Such a definition already exists: the control standard set out in the concurring opinion in *Huff*. In fact, but for the intervening issuance of the *Gutfreund* order, the control standard would probably be of general application today. As the Commissioners who articulated the standard put it: control is the essence of supervision. Legal and compliance officials should be held to the same standard. In some firms, they can break trades and discipline employees for misconduct.[38] Query: is that control? Moreover, as the *Gutfreund* order – properly understood demonstrates – legal and compliance officials may exercise control indirectly, through membership in defined control groups. But ultimately, as a matter of policy, legal and compliance officials should be treated the same as everyone else: they should not be responsible for conduct they do not control.

Fourth, we should remember an important element of the control standard that has been lost in the *Gutfreund*-inspired search for generalized influence. That is the need to put responsible parties on notice of their responsibility. The concurring opinion in *Huff* stated it thus: "it should have been clear to the individual in question that he was responsible for the actions of

[37] Although, we should note, even in this setting, the standard would have made more sense if the Commission had drafted it as: "responsibility, ability, *and* authority."

[38] *See e.g.*, *In re Newbridge Securities Corp.*, Initial Decision, 96 SEC Docket 241 (SEC Rel. No. 380) (June 9, 2009) (discussing authority of trading compliance officer).

another and that he could take effective action to fulfill that responsibility."[39] In other words, to state this as a matter of policy: control is the essence of supervision, and notice of responsibility is the essence of liability. This suggestion is also timely. As collective decision-making institutions have spread across the financial sector, many firms are establishing governance structures for them. Careful planning in this regard could work well within a properly understood *Gutfreund* standard. That is, as firms define what their committees will supervise and who will control the committees, they can decide how to meet the collective responsibility test set out in the *Gutfreund* standard. This would put participants on notice of their responsibilities and the matters for which they will be held accountable.

Fifth and finally, we should recognize that difficult facts will not disappear. Some future adjudicator will again address the supervisory responsibility of a powerful individual who claims to have been giving only advice. Framing the issue as control, not influence, should help avoid the subjective considerations that have troubled application of the *Gutfreund* standard. We can only wonder what would have happened in the *Urban* case, had the Commission, in some previous year, adopted the control standard, instead the *Gutfreund* standard. The next case, hopefully, will turn on demonstrable evidence of control, or the lack thereof, and not on speculation about influence.

In conclusion, properly understood, the *Gutfreund* standard could have an important role to play in addressing the recent growth of collective decision-making. This would be a positive turn of events from the incoherence, speculation, and confusion it is causing today.■

[39] *In re Huff,* Exch. Act Rel. No. 34-29017, 50 SEC 524, 532 (March 28, 1991) (Shapiro & Lochner, Comm'rs, concurring).

FCPA INTERNAL INVESTIGATIONS IN LATIN AMERICA

Latin America continues to be a prime target for FCPA enforcement actions. In recent cases, parent companies have been held liable for actions by subsidiaries and third-party consultants. Other charges have involved payments to employees of state-owned enterprises and reimbursement for travel and entertainment of officials unrelated to valid business purposes. The authors discuss the cases and suggest five strategies for conducting effective FCPA investigations in the region.

By Ivonne Mena King, Jaime Guerrero, and Lauren L. Valiente *

Over the past few years, United States government enforcement agencies have focused their attention on potential Foreign Corrupt Practices Act ("FCPA") violations in China, Russia, and other individual countries. Analyzing the government's enforcement actions is necessary and helpful in understanding the role of the FCPA and the nature of the potential business practices at risk in those countries, particularly when facing a potential FCPA investigation. For multinational companies operating in Latin America, the challenges inherent in conducting operations in multiple countries, with multiple cultures and multiple languages, are compounded when government enforcement agencies are investigating potential violations of the FCPA.

The risks associated with potential FCPA violations in Latin America are rising, as government regulators have steadily increased both the number of FCPA prosecutions on a yearly basis, as well as the financial penalties imposed for violating the FCPA. Indeed, the number of FCPA prosecutions with a Latin American component is also increasing, indicating that government regulators are taking a hard look at alleged violations of the FCPA in Latin America. Specifically, in 2010 and 2011, the Department of Justice disclosed approximately 44 FCPA and related enforcement actions. Of those 44 FCPA and related cases, 14 (32%) had a Latin American component, with affected countries including but not limited to Argentina, Brazil, Costa Rica, Honduras, Mexico, and Nicaragua.

When faced with allegations of potential violations of the FCPA, the following are five practical strategies for companies conducting an effective and efficient FCPA investigation in Latin America:

- **First:** Use counsel that speaks the local language and has experience conducting FCPA investigations in Latin America;
- **Second:** Understand the customs, cultures, and relevant political and socio-economic systems of the Latin American countries involved;
- **Third:** Before collecting documents, understand the data privacy rules of each country;
- **Fourth:** Before transferring collected documents to the U.S., understand the legal ramifications; and
- **Fifth:** Use document filter programs and vendors that have proper filters for working with Spanish and Portuguese language documents.

LATIN AMERICA AND THE CORRUPTION PERCEPTIONS INDEX

Latin America, which is made up of South America, Central America, the Caribbean, and Mexico, consists of approximately 20 countries. While there is no unifying definition of the countries that make up Latin America, the general consensus is that the term refers broadly to all of the Americas south of the United States where the Spanish or Portuguese languages prevail.

The seven largest countries in Latin America, by population and gross domestic product, are Brazil, Mexico, Colombia, Argentina, Peru, Venezuela, and Chile. While six of these countries, excluding Brazil, share the same Spanish language, they each operate under different political systems and socio-economic

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conditions. The political systems range from representative democratic republics in Mexico, Peru, Colombia, Chile, and Argentina to a semi-socialist state in Brazil to a near socialist dictatorship in Venezuela.

Transparency International ("TI")'s annual report, rating countries on the perception of corruption in its annual Corruption Perception Index ("CPI"), defines corruption as the abuse of entrusted power for private gain in both the public and private sectors. In 2011, the TI gave CPI scores to countries ranging from a high of 9.5 to a low 1.0, with a lower score representing a greater perception of corruption than a country with a higher score. In the 2011 CPI, of the seven largest countries in Latin America, only one, Chile (7.2), ranked above a CPI of 7.0. The other six countries scored below 4.0, with Venezuela (1.9) ranking at the bottom of the regional results for Latin America.

FCPA – AN OVERVIEW

The FCPA has two components: antibribery provisions and accounting/internal controls provisions, each of which is explained in further detail below. The U.S. Department of Justice and the U.S. Securities and Exchange Commission jointly enforce the FCPA. Although Congress enacted the FCPA in 1977, the statute lay dormant, seldom invoked for decades. In recent years, however, the SEC and DOJ have turned to the FCPA as a primary tool to investigate bribery of foreign officials, and the number of enforcement actions has grown substantially. Moreover, while the DOJ and the SEC previously focused almost exclusively on businesses, the recent trend is also to target individuals. Thus, businesses and individuals that face government scrutiny are advised to conduct effective and efficient internal investigations to root out potential violations of the FCPA.

The Antibribery Provisions

The antibribery provisions prohibit U.S. "issuers" and "domestic concerns"[1] from corruptly[2] offering or providing anything of value to foreign government officials to influence the officials' acts or decisions in order to obtain or retain business.[3] The antibribery provisions also cover foreign persons and entities that perform any act in furtherance of an improper payment within U.S. territory.[4] The DOJ is responsible for all criminal enforcement of the antibribery provisions, as well as civil enforcement with respect to domestic concerns and foreign persons and entities.[5] The SEC is responsible for civil enforcement with respect to issuers.[6] Both the DOJ and the SEC interpret the concepts of "anything of value,"[7] "foreign official,"[8] the

[1] An "issuer" is any publicly held company that is subject to the registration or reporting requirements of the Securities Exchange Act of 1934. 15 U.S.C. § 78dd-1(a). A "domestic concern" is any individual who is a United States citizen, national, or resident, or any business organized under the laws of the United States or which has its principal place of business in the United States. 15 U.S.C. § 78dd-2(h)(1).

[2] "Corruptly" connotes "an evil motive or purpose," "an intent or desire wrongfully to influence the recipient," H.R. REP. NO. 95-640, at 8 (1977), and/or a *quid pro quo* between payment and

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the official act. *See United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998) (concluding that "[t]his sort of 'I'll scratch your back if you scratch mine' arrangement constitutes bribery because the payer made payments with the intent to exchange them for specific official action").

[3] DEPT. OF JUSTICE, LAY-PERSON'S GUIDE TO FOREIGN CORRUPT PRACTICES ACT ANTIBRIBERY PROVISIONS (the "LAY-PERSON'S GUIDE"), at pp. 1-2, *available at* www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf; 15 U.S.C. §§ 78dd-1, -2, and -3.

[4] 15 U.S.C. § 78dd-3(a).

[5] LAY-PERSON'S GUIDE, at p. 2.

[6] *Id*.

[7] "Anything of value" is not statutorily defined. However, the term has been broadly construed to include not only cash or a cash equivalent, but also discounts, gifts, use of materials, facilities, or equipment, entertainment, drinks, meals, transportation, lodging, insurance benefits, and promise of future employment. *See, e.g., United States v. Liebo*, 923 F.2d 1308, 1310-12 (8th Cir. 1991) (airline ticket); *United States v. Metcalf & Eddy*, Civ. A. No. 99-12566 (D. Mass. 1999) (accommodation upgrades); Dept. of Justice, FCPA Review Proc. Release 00-01 (Mar. 29, 2000) (insurance benefits and promises of future employment). There is no *de minimis* value associated with the "anything of value" element, and the perception of the recipient and the subjective valuation of the thing conveyed are often key factors that enforcement agencies consider in determining whether "anything of value" has been given to a foreign official.

[8] The FCPA broadly defines "foreign official" to include the following:

(i) any elected official, officer, or employee of a foreign government, including departments, agencies, and instrumentalities thereof (such as a customs agent); (ii) any officer or employee of a government-owned or government-controlled state enterprise; (iii) any officer or employee of a "public international organization;" (iv) any person acting in an

intent to "influence acts or decisions,"[9] and the goal to "obtain or retain business"[10] very broadly. Accordingly, the antibribery provisions apply to more than just the conceptually classic scenario of the suitcase full of cash to a foreign minister to secure a government contract.

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official capacity for or on behalf of a foreign government, government entity, or public international organization; or (v) any private consultant who also holds a position with, or acts on behalf of, a foreign government or with a public international organization, or with an enterprise owned or controlled by a foreign government.

15 U.S.C. §§ 78dd-1(f)(1)(A), -2(h)(2), -3(f)(2)(A). The DOJ and SEC broadly interpret "foreign official" to include not only traditional government employees, but also employees of state-owned or state-controlled entities ("SOE") under the theory that SOEs are an "instrumentality" of the foreign government. FCPA enforcement actions and other enforcement agency pronouncements instruct that once a foreign company (such as an oil and gas entity, a hospital, or laboratory, etc.) is deemed to be an "instrumentality" of a foreign government, every single employee of the entity (regardless of rank or title) will be considered a foreign official regardless of how local law may characterize the employee.

[9] The FCPA prohibits a payment made for one or more of the following unlawful purposes:

(i) influencing any act or decision of a government official in his or her official capacity; (ii) inducing such foreign official to do or omit any act in violation of a lawful duty; (iii) inducing such official to use his or her influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality; or, [since the enactment of the 1998 amendments,] (iv) securing any improper advantage.

[10] Under the FCPA, a payment is prohibited if made to obtain or retain business or to direct business to any person. 15 U.S.C. §§ 78dd-1(a)(1)(B), -2(a)(1)(B), -3(a)(1)(B). The government has long construed this element broadly. *See SEC v. Triton Energy Corp.*, Civ. Act. No. 1:97CV00401 (D.D.C. Feb. 27, 1997) (SEC enforcement action predicated on payments made to reduce tax obligations in Indonesia). Moreover, as a result of *United States v. Kay*, 513 F.3d 432 (5th Cir. 2007), *cert. denied* 129 S. Ct. 42 (2008), the DOJ interprets the "obtain or retain" element to prohibit payments to foreign officials not just to buy any act or decision, and not just to induce the doing or omitting of an official function "to assist . . . in obtaining or retaining business for or with, or directing business to, any person," but also the making of a payment to such a foreign official to secure an "improper advantage," such as seeking favorable tax treatment from a government official even if not directly related to securing or maintaining a specific business relationship.

Moreover, the FCPA does not require that any part of the violation actually occur within the United States, so business leaders must be knowledgeable about all business activity, including that which takes place thousands of miles away from corporate headquarters.

The antibribery provisions are subject to one exception and two affirmative defenses. The exception is for payments made to facilitate or expedite performance of a "routine governmental action."[11] This limited exception only applies to such generally non-discretionary actions as processing government paperwork and providing routine government services, such as police protection and mail pick-up.[12] Routine governmental action does not include a decision by a foreign official to award business to, or to continue business with, a company.[13] The affirmative defenses are that delivery of the thing of value was either, (i) lawful under the written laws and regulations of the foreign country, or (ii) a reasonable and bona fide expenditure directly related to the promotion, demonstration, or explanation of products or services, or the execution or performance of a contract.[14] In a civil case brought by the SEC, the FCPA defendant has the burden of demonstrating that the payment in question meets the requirements of the affirmative defense.[15] In contrast, in a criminal case brought by the DOJ, the FCPA defendant has the burden of producing evidence in support of the affirmative defense but the government must then disprove the affirmative defense generally beyond a reasonable doubt.[16]

Accounting/Internal Controls Provision

The FCPA's Books and Records and Internal Control provisions apply to U.S. issuers, and require, in sum, that

[11] LAY-PERSON'S GUIDE, at p. 4; 15 U.S.C. § 78dd-1(b), -2(b), and -3(b).

[12] *See* 15 U.S.C. § 78dd-1(f)(3)(A), -2(h)(4)(A), and -3(f)(4)(A), defining "routine government action" by giving examples.

[13] 15 U.S.C. § 78dd-1(f)(3)(B), -2(h)(4)(B), and -3(f)(4)(B), each of which specifically states that, "[t]he term 'routine governmental action' does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party."

[14] *See* 15 U.S.C. § 78dd-1(c), -2(c), and -3(c).

[15] LAY-PERSON'S GUIDE, at p. 5.

[16] *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975); *United States v. Jackson*, 569 F.2d 1003, 1008 n.12 (7th Cir. 1978).

the issuer, (i) keep its books, records, and accounts in reasonable detail to accurately and fairly reflect transactions and dispositions of assets, and (ii) devise a system of internal accounting controls.[17] While these provisions technically apply only to issuers and not to foreign subsidiaries, the enforcement agencies routinely hold parent companies liable for false or fraudulent entries on any book or record that is ultimately consolidated with an issuer's books and records for financial reporting purposes.

In many instances, improper payments to a foreign official to obtain or retain business result not only in antibribery charges, but also accounting/internal controls charges. This is because improper payments are often falsely characterized on a company's books and records as "miscellaneous" expenses and "commissions." Violations of the accounting/internal controls provisions can also be charged in isolation even if antibribery violations are not charged.

ENFORCEMENT RELATING TO ACTIVITY IN LATIN AMERICA

Latin America continues to be a prime target in this era of increased FCPA enforcement. The specific industries and activities being targeted by the U.S. government in Latin America can best be understood by examining some of the recent enforcement actions brought by the DOJ and SEC.

State-owned telecommunications and utilities companies in Latin America remain common targets of FCPA enforcement. For example, in 2010, the DOJ and SEC disclosed the resolution of FCPA enforcement actions against Alcatel, S.A., a global provider of telecommunications equipment and services, relating to the actions of several of Alcatel's subsidiaries in various countries, including Costa Rica and Honduras.[18] The DOJ and SEC alleged that Alcatel's Costa Rican subsidiary funneled bribes to officials of Costa Rica's Instituto Costarricense de Electricidad ("ICE") for the purpose of obtaining and retaining business from ICE. The DOJ and SEC also alleged that Alcatel's subsidiary in Honduras funneled bribes to officials of Honduras' Empresa Hondurefia de Telecommuncaciones ("Hondutel") for the purpose of retaining five telecommunications contracts worth approximately $47 million.[19] In both Costa Rica and Honduras, the subsidiaries funneled payments to foreign officials through third-party consultants. Alcatel improperly recorded these payments as legitimate expenses in its books and records. Based on this conduct, the DOJ charged Alcatel with violating the internal control and books and records provisions of the FCPA.[20] The DOJ also charged Alcatel's subsidiaries with conspiring to violate the FCPA's antibribery, books and records, and internal control provisions.[21] To resolve the enforcement actions, Alcatel agreed to enter into a deferred prosecution agreement with the DOJ for a term of three years.[22] Alcatel's subsidiaries pled guilty to the charges, and both Alcatel and the subsidiaries agreed to pay a $92 million fine to the DOJ.[23] To resolve the SEC's enforcement action, Alcatel agreed to pay $45,372,000 in disgorgement and prejudgment interest.[24]

The Alcatel enforcement action highlights two common areas of potential exposure to FCPA liability for companies doing business in Latin America. First, parent companies can be held liable for the actions of their subsidiaries especially where improper payments made by the subsidiary are recorded in the books and records of a public parent company as legitimate expenses. Second, companies can be held liable for the actions of third-party consultants retained by the company to assist in obtaining or retaining business in Latin America. For this reason, it is essential that third-party consultants and agents be subjected to appropriate due diligence and audit procedures to ensure that their

[17] 15 U.S.C. § 78m(2).

[18] Press Release, Department of Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010); Press Release, U.S. Securities and Exchange Commission, SEC Files Settled Foreign Corrupt Practices Act Charges Against Alcatel-Lucent, S.A. With Total Disgorgement and Criminal Fines of Over $137 Million (Dec. 27, 2010).

[19] Information, *United States v. Alcatel-Lucent, S.A.*, No. 1:10-cr-20907-PAS (S.D. Fla. Dec. 27, 2010); Complaint, *Securities and Exchange Commission v. Alcatel-Lucent, S.A.*, No. 1:10-cv-24620 (S.D. Fla. Dec. 27, 2010).

[20] Information, *United States v. Alcatel-Lucent, S.A.*, No. 1:10-cr-20907-PAS (S.D. Fla. Dec. 27, 2010).

[21] Information, *United States v. Alcatel-Lucent* France, S.A., No. 1:10-cr-20906-PAS (S.D. Fla. Dec. 27, 2010).

[22] Press Release, Department of Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010).

[23] *Id.*

[24] Press Release, Securities and Exchange Commission, SEC Files Settled Foreign Corrupt Practices Act Charges Against Alcatel-Lucent, S.A. with Total Disgorgement and Criminal Fines of Over $137 Million (Dec. 27, 2010).

activities pose no potential threat of FCPA liability to the hiring company.

In October 2010 in one of the few FCPA cases to go to trial, the DOJ charged Lindsey Manufacturing Company, along with its CEO and CFO, with conspiracy to violate the FCPA and with substantive FCPA violations relating to Lindsey's business dealings with the Mexican state-owned utility company, Comisión Federal de Electricidad ("CFE").[25] The DOJ alleged that Lindsey, a provider of emergency restorations systems and other equipment used by electrical utility companies, used third-party sales representatives to make improper payments and provide other things of value to CFE officials. Specifically, the DOJ alleged that Lindsey paid a 30% commission to its sales representative in Mexico while knowing that all or part of that commission would be paid by the sales representative to CFE officials in exchange for CFE awarding contracts to Lindsey. The sales representative allegedly used the commission payments received from Lindsey to purchase, among other things, a $1.8 million yacht and a $297,500 Ferrari for a CFE official. The sales representative also paid more than $170,000 worth of American Express bills for a CFE official and sent approximately $600,000 to the CFE official's relative. Prior to trial, Lindsey challenged the government's broad interpretation of the FCPA's foreign official element.[26] Specifically, Lindsey argued that the term "foreign official" should not include employees of commercial enterprises that are wholly or partially owned by a foreign government such as CFE.[27] The court ruled in favor of the government on that issue, holding that under certain circumstances, employees of state-owned enterprises can be foreign officials under the FCPA.[28] On May 10, 2011, a jury found Lindsey and its two executives guilty of the charged offenses.[29] However, on December 1, 2011, the judge overturned the convictions and dismissed the case with prejudice based on a finding of prosecutorial misconduct.[30] Specifically, the judge found that, among other misconduct, the government had allowed a key FBI agent to testify untruthfully before the grand jury, inserted material falsehoods into affidavits submitted to magistrate judges in support of warrants, improperly reviewed e-mail communications between one defendant and her attorney, recklessly failed to comply with its discovery obligations, and made misrepresentations to the Court.[31] The Lindsey case, along with providing another example of liability imposed on a company based on payments made through third-party service providers, also highlights the fact that providing anything of value beyond traditional notions of "cash in a suitcase" to foreign officials, including making payments to the foreign official's relatives, can subject a company to FCPA liability. The Lindsey case also demonstrates a critical area of FCPA exposure, that is, business dealings with state-owned commercial enterprises whose employees can be considered foreign officials under the FCPA.

In 2009, Latin Node, Inc., a telecommunications company, pled guilty to charges that its employees paid approximately $1,099,889 to officials of a Honduran state-owned telecommunications company, Empresa Hondureña de Telecomunicaciones ("Hondutel"), in exchange for (a) obtaining an interconnection agreement with Hondutel; and (b) reducing the rate per minute charged to Latin Node under that agreement.[32] Under its plea agreement with the DOJ, Latin Node agreed to pay a $2 million criminal fine, a $400 special assessment (per statute, $100 for each count of conviction), and agreed to cooperate with the government's investigations of the executives who took part in the bribery scheme. In December 2010 and January 2011, the DOJ charged four former Latin Node executives, including the former CEO, CFO, CCO, and Vice President of Business Development, in connection with the bribery of Hondutel officials.[33] All four executives pled guilty.[34]

[25] Press Release, Department of Justice, California Company and Two Executives Indicted for Their Alleged Participation in Scheme to Bribe Officials at State-Owned Electrical Utility in Mexico (Oct. 21, 2010).

[26] Defendants' Notice of Motion and Motion to Dismiss the First Superseding Indictment, *United States v. Aguilar*, No. 2:10-cr-01031-AHM (C.D. Ca. Feb. 28, 2011).

[27] *Id.*

[28] *See* Order, *United States v. Aguilar*, No. 2:10-cr-01031-AHM (C.D. Ca. April 20, 2011).

[29] *See* Verdict, *United States v. Aguilar*, No. 2:10-cr-01031-AHM (C.D. Ca. May 10, 2011).

[30] Order Granting Motion to Dismiss, *United States v. Aguilar*, No. 2:10-cr-01031-AHM (C.D. Ca. Dec. 1, 2011).

[31] *Id.*

[32] Press Release, Department of Justice, Latin Node, Inc., Pleads Guilty to Foreign Corrupt Practices Act Violation and Agrees to Pay $2 Million Criminal Fine (April 7, 2009).

[33] Informations, *United States v. Granados*, No. 1:10-cr-20881 (S.D. Fla. Dec. 21, 2010); *United States v. Salvoch*, No. 1:10-cr-20893 (S.D. Fla. Jan 1, 2011); *United States v. Vasquez*, No. 1:10-cr-20894 (S.D. Fla. Jan. 19, 2011).

[34] Plea Agreements, *United States v. Granados*, No. 1:10-cr-20881 (S.D. Fla. May 19, 2011); *United States v. Salvoch*, No.

The CEO was sentenced to 46 months in prison and two years of supervised release. The other three executives face up to five years in prison.[35] The Latin Node enforcement action illustrates the Government's increased willingness to pursue individuals for FCPA violations, and the significant risk of substantial jail time faced by individuals who are ultimately convicted. Also of significant note, is that the activity at issue in the Latin Node case was discovered by eLandia International, Inc. when it acquired Latin Node as a subsidiary in 2007.[36] By having procedures in place that allowed it to uncover the bribery scheme, and by promptly reporting that discovery to the Government, eLandia was able to escape liability for the newly acquired subsidiary's prior FCPA violations. However, parent companies who fail to conduct proper due diligence and take other steps to uncover FCPA violations by a target company may expose themselves to FCPA liability based on conduct of a newly acquired subsidiary that occurred prior to the acquisition. Similar exposure is present in the context of mergers and joint venture relationships.

Under certain circumstances, the reimbursement of travel and entertainment expenses to foreign officials can also subject companies to criminal liability under the FCPA. For example, in 2011, Aon Corporation, a risk management and insurance brokerage firm, resolved FCPA enforcement actions with the DOJ and SEC relating to, in part, reimbursements paid by a U.K. subsidiary to officials of Costa Rica's state-owned insurance company, Instituto Nacional de Seguros ("INS"); the reimbursements were for travel expenses for trips taken by INS officials with their spouses to overseas destinations, and other expenses that were unrelated to any training, education, or other business purpose.[37] In resolution of the enforcement actions, Aon entered into a non-prosecution agreement and agreed to pay a $1.76 million penalty to the DOJ.[38] Aon also agreed pay approximately $14.5 million in disgorgement and prejudgment interest to the SEC. To minimize the liability exposure for payments of travel and entertainment expenses, companies should develop policies and procedures for the reimbursement of such expenses to foreign officials, and ensure proper and routine training of employees on those policies and procedures.

Two other recent enforcement actions are worthy of note. First, in December 2011, in the most recent enforcement action to target activity in Latin America, the DOJ charged eight former executives and agents of Siemens Aktiengesellschaft ("Siemens AG") and its subsidiaries with violating the FCPA by engaging in a scheme to bribe officials of the Argentine government in order to obtain a $1 billion contract to produce national identity cards.[39] The eight former executives and agents of Siemens AG have not yet made an appearance in the district court in New York to face the criminal charges, as they all live overseas and there have been no reports of their arrests overseas. None of the individuals are U.S. citizens and they live in Germany, Switzerland, or Argentina.

Finally, in September 2011, Bridgestone Corp. pled guilty to conspiring to violate the FCPA and the Sherman Antitrust Act and agreed to pay a $28 million fine.[40] Bridgestone, a Japanese company, manufactures and sells marine hose, a flexible rubber hose used to transfer oil between tankers and storage facilities and/or buoys.[41] The FCPA charges leveled at Bridgestone related to bribes paid by Bridgestone and its subsidiaries to officials of various state-owned entities throughout Latin America, including employees of Petroleos Mexicanos in Mexico, to obtain or retain sales of marine hose. Like the Lindsey case, Bridgestone highlights the liability exposure inherent in doing business with companies that are owned, either wholly or partially, by a foreign government.

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1:10-cr-20893 (S.D. Fla. Jan 12, 2011); *United States v. Vasquez*, No. 1:10-cr-20894 (S.D. Fla. Jan. 21, 2011).

[35] Judgment, No. 1:10-cr-20881 (S.D. Fla. Sept. 13, 2011).

[36] Press Release, Department of Justice, Latin Node, Inc., Pleads Guilty to Foreign Corrupt Practices Act Violation and Agrees to Pay $2 Million Criminal Fine (April 7, 2009).

[37] Press Release, Department of Justice, Aon Corporation Agrees to Pay $1.76 Million Criminal Penalty to Resolve Violations of the Foreign Corrupt Practices Act (Dec. 20, 2011).

[38] *Id.*

[39] Press Release, Department of Justice, Eight Former Senior Executives and Agents of Siemens Charged in Alleged $100 Million Foreign Bribe Scheme (Dec. 13, 2011).

[40] Press Release, Department of Justice, Bridgestone Corporation Agrees to Plead Guilty to Participating in Conspiracies to Rig Bids and Bribe Foreign Government Officials (Sept. 15, 2011).

[41] Information, *United States v. Bridgestone Corp.*, No. 4:11-cr-00651 (S.D. Tx. Sept. 15, 2011).

STRATEGIES FOR CONDUCTING AN EFFECTIVE FCPA INVESTIGATION IN LATIN AMERICA

First: Use Counsel that Speaks the Local Language and Has Experience Conducting FCPA Investigations in Latin America

The complexities of conducting an internal investigation are compounded when the investigation is conducted in a foreign country with a foreign language. An internal investigation will likely require the identification, collection, and review of documents, as well as interviews of company personnel to determine if any wrongdoing occurred. Assuming the documents are in Spanish and the witnesses speak Spanish as their first language, the company is best served by retaining experienced Spanish-speaking counsel.

Spanish-speaking counsel can review documents without the delay and expense of translating them. Document translation services can bridge the divide by providing translations of certain key documents. However, such services can be costly and ineffective, with a possibility that the service fails to appropriately identify the document in context or appreciate the significance of certain aspects of the native language in the document. A foreign-language-speaking attorney can thus efficiently review key documents and analyze the importance of such documents in the context of the overall internal investigation.

Spanish-speaking counsel can also conduct interviews of employees in their native language. This has the advantage of putting the witness at greater ease compared to an interview requiring a translator. Being interviewed by foreign counsel can be intimidating and overwhelming for a company employee. In addition, using an interpreter makes it difficult for the lawyer to establish rapport with the witness, may increase an employees' stress level, and may decrease the amount and quality of the information obtained from the employee.

Moreover, conducting the interview in the witness's native tongue has the added benefit of ensuring that the nuances of the witness's statements are not lost in translation. The necessity of understanding and deciphering the tone and intent in a witness's statements is critical in an investigation. A failure by a translator to accurately translate the witness's statements, including tone and intent, can alter the scope of an investigation or lead to improper conclusions. Finally, an additional benefit to using foreign-language-speaking attorneys to conduct interviews is that the company can avoid the costs associated with having an interpreter present to assist during the interviews.

Second: Understand the Customs, Cultures, and Relevant Systems of the Latin American Countries Involved

The risk of potential FCPA violation varies from country to country in Latin America because of the various political systems, cultures, and customs in each country in which a multinational company may operate. It is important to understand the form and substance of the political and industrial systems, because of the practical need to understand whether a company employee is negotiating with a private individual or a "foreign official."

The DOJ and SEC broadly interpret the term "foreign official" within the FCPA's antibribery provisions to include not only traditional government employees, but also employees of state-owned or state-controlled entities. While there have been serious challenges to the government's broad interpretation of "foreign official" in a number of cases, to date there has been no definitive resolution by the federal courts.

Accordingly, when the government has set its sights on a multinational company for potential violations of the FCPA, the company should factor in the political systems, cultures, and customs of the countries in which it operates before planning and commencing an internal investigation in response to the alleged violations.

Third: Before Collecting Documents, Understand the Data Privacy Rules of Each Country

Once a multinational company has committed to conducting an FCPA investigation in Latin America, the complexities and realities of preparing for and conducting such an investigation must be addressed. Specifically, the practical considerations of collecting and reviewing electronic and hard copy documents from company employees warrant careful and deliberate consideration. A company conducting an FCPA investigation must determine the applicable local laws and regulations that control how documents are collected from company employees. Moreover, once the company collects the documents from the company employees, it must then determine where and how such documents are reviewed.

Before collecting employee documents, the company must determine whether the Latin American country at issue has laws restricting the collection of documents without employee consent. Indeed, many Latin

American countries prohibit the collection of documents from employees without the express written consent of the employees whose documents the company seeks to collect. Such explicit consent is in addition to, and supplements, any prior purported consent that an employee agrees to as part of his or her employment. Moreover, the language used to obtain the consent must follow the explicit guidelines provided by the Latin American country's data collection and privacy laws.

Fourth: Before Transferring Collected Documents to the U.S., Understand the Legal Ramifications

After all relevant documents have been collected from the affected employees, the company must then determine how and where the documents are going to be reviewed. There are various document review techniques and technologies that a company can use to conduct a thorough and effective review. Before making a decision on how to conduct the document review, however, the company must determine where the relevant electronic and hard copy documents are going to be reviewed. Specifically, the company must decide whether the relevant documents are going to be moved to the United States for the document review.

The decision to move documents to the United States from the Latin American country under investigation is one that must be made with due consideration of the consequences of moving documents within the jurisdiction of the government enforcement agencies. The United States enforcement agencies, including DOJ and SEC, do not have subpoena power to compel entities located in Latin America to produce documents in the United States. The United States has entered into Mutual Legal Assistance Treaties ("MLAT") with a number of Latin American countries that permit the United States to request the production of documents into the United States from entities in foreign jurisdictions. However, such MLAT requests are time consuming and not necessarily effective. Moreover, there are a number of countries in Latin America that have not entered into MLATs with the United States.

To avoid the inherent delays associated with MLAT requests, the United States enforcement agencies' goal is to have the company and/or individuals under investigation agree to voluntarily produce documents. A company and/or individual under investigation, however, can potentially use the delay inherent in the MLAT process as leverage to limit the scope of the government's requests for production of documents.

If a company decides to voluntarily move the documents to the United States to effectuate their review, such documents may no longer be outside the jurisdiction of the government enforcement agencies. Indeed, the documents that have been collected and moved into the United States may now be considered within the jurisdiction of the government enforcement agencies. DOJ and SEC can then issue subpoenas to the company to compel their production.[42] A decision to move documents into the United States for review must thus be made with considerations of the potential for later compelled production to government enforcement agencies.

If it is inevitable that the investigation and documents are going to be turned over to government regulators, then a company may prefer to bring the documents to the United States for review. Reviewing the documents in the native country can substantially increase legal expenses.

Fifth: Use Document Filter Programs and Vendors that Have Proper Filters for Working with Spanish and Portuguese Language Documents

Irrespective of whether the review of documents occurs outside the United States or the documents are moved into the United States for the review, the company conducting the investigation should consider dedicated document review companies and technologies. Such document review companies and technologies can decrease the ultimate cost of the document collection and review, by narrowing the ultimate number of documents to be reviewed by the attorneys conducting the investigation. A dedicated document review company, with sophisticated document filtering and review technologies, can both filter the documents collected for relevance and conduct a pre-attorney review to limit the number of documents reviewed. Specifically, the filtering technology can review the collected documents through its filtering software to exclude non-relevant documents. Such filtering can significantly reduce the number of documents subject to potential review. Moreover, the document review company can assist the company conducting the review

[42] *Ratliff v. Davis, Polk & Wardwell*, 354 F.3d 165 (2d Cir. 2003) (noting that, "documents held by an attorney in the United States on behalf of a foreign client, absent privilege, are as susceptible to subpoena as those stored in a warehouse within the district court's jurisdiction."); *In re Grand Jury Subpoena, served on White & Case LLP, Lieff, Cabraser, Heinemann, Bernstein LLP, K&L Gates LLP, and Nossaman LLP*, 627 F.3d 1143 (9th Cir. 2010) (noting that "[b]y a chance of litigation, the documents have been moved from outside the grasp of the grand jury to within its grasp.").

by using technology to conduct an electronic pre-attorney review to cull and identify categories of relevant documents.

Both the filtering and the pre-attorney review of documents, whether conducted by a document review company inside or outside the United States, can significantly reduce the costs associated with the investigation. This is so because the volume of documents to be reviewed by attorneys in anticipation of potential interviews will be reduced from the initial volume of documents collected from affected employees. Thus, prior experience with selecting the right filtering programs will avoid costly mistakes.

Of particular concern when using a dedicated document review company, however, is whether the company's technology has the ability to review documents in foreign languages. Specifically, when conducting an investigation in Latin America the document review company should have appropriate technology to recognize, review, and collate Spanish or Portuguese language characters (or any special characters in any other languages present in the investigation). A failure to appropriately identify and search documents with the appropriate Spanish or Portuguese language characters can lead to an ineffective and incomplete review, and it could also cost the company millions of dollars. Thus, it is imperative that the company conducting an investigation in Latin America selects a document review company with sophisticated and thorough software and technology with the ability to recognize and review Spanish or Portuguese language characters.

CONCLUSION

Corporations operating in Latin America face numerous challenges in conducting operations in multiple countries, with multiple cultures and languages. Those challenges are compounded when government enforcement agencies are investigating potential violations of the FCPA. While every FCPA investigation is unique, whether conducted in Latin America or otherwise, it is important to take into consideration the steps necessary to conduct the investigation in an effective and efficient manner.

Conducting an FCPA investigation can be a time- and resource-consuming endeavor, one with numerous factors to consider when planning and executing the investigation. While this article does not cover all the issues and factors to consider when conducting an investigation, it does set forth essential strategies for conducting an effective and efficient FCPA investigation in Latin America. ■

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