

## WSGR ALERT

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### DEPARTMENT OF JUSTICE AND BAE SYSTEMS' \$400 MILLION SETTLEMENT CONTINUES TREND OF INCREASED FCPA ENFORCEMENT

On March 1, 2010, BAE Systems, one of the largest military defense contractors in both Europe and the United States, pleaded guilty in U.S. federal court in the District of Columbia to one count of conspiracy to make false statements that impaired and impeded the lawful functions of the United States government. Specifically, through its guilty plea, BAE admitted that it made false statements about its implementation of and commitment to a Foreign Corrupt Practices Act (FCPA) compliance program. In addition, BAE admitted that it failed to identify commissions paid to promote the sale of its defense goods in applications for export licenses as required by the Arms Export Control Act. BAE agreed to pay a \$400 million criminal fine, one of the largest-ever FCPA-related settlements, to end the long-running investigations into alleged improper payments to foreign officials to secure lucrative defense contracts. BAE also agreed to certain reporting requirements and to retain an independent compliance monitor for a period of three years.

BAE's settlement with the United States Department of Justice (DOJ) first was announced on February 5, 2010, when the United Kingdom's Serious Fraud Office (SFO) announced that BAE likewise had reached a separate settlement agreement with the SFO to conclude a long-running investigation of alleged bribery by BAE in connection with defense projects in Saudi Arabia, Africa, and Europe. Through its settlement with the SFO, BAE agreed to pay a £30 million fine and plead guilty to a charge of failing to keep accurate records in connection with commissions paid to marketing consultants who assisted BAE in selling an air-traffic-control radar system to the Tanzanian

government. This represents a record criminal fine paid by a company in the U.K.

#### Background

The FCPA's anti-bribery provisions prohibit the payment, offer, or authorization of anything of value to officials of a foreign government, international organization, state-owned entity, or political party for the purpose of: (1) influencing improperly the performance of their official duties; (2) inducing them to use their influence to affect a foreign government's or agency's decision; (3) obtaining or retaining business for anyone; or (4) directing business to anyone.

According to the criminal information filed by the DOJ, from 2000 to 2002, BAE represented to the U.S. government that the company would create and implement policies and procedures to ensure compliance with the anti-bribery standards of the FCPA and similar foreign laws implementing the Organization for Economic Cooperation and Development (OECD) Anti-Bribery Convention. In particular, in 2000, BAE's then-CEO stated in a letter to then-Secretary of Defense William S. Cohen that the company's U.S. affiliates were complying with the FCPA and that BAE's non-U.S. entities likewise would comply with the FCPA and would implement a compliance program within six months to ensure continued compliance.

The DOJ charged, however, that BAE knowingly and willfully failed to implement such procedures and controls and, in fact, made improper payments in connection with various defense contracts that, consequently, received deficient scrutiny. Specifically, BAE made a series of substantial payments to

shell companies and third-party intermediaries that were not reviewed with the degree of scrutiny to which BAE told the government the payments would be subjected. The DOJ alleged that BAE had paid "marketing advisors" to assist in securing sales of defense items without properly scrutinizing those advisors and actively concealed its relationships with and payments to some of the advisors. For example, the DOJ alleged that after May 2001, BAE contracted with and paid certain advisors through various offshore shell companies beneficially owned by BAE, and encouraged certain advisors to establish their own offshore shell companies to receive payments from BAE while disguising the origins and recipients of the payments. The alleged payments involved deals with Saudi Arabia, the Czech Republic, and Hungary for military aircraft and other equipment. BAE allegedly gained in excess of \$200 million through the improperly obtained contracts.

The DOJ also claimed that BAE made false statements to the U.S. government by failing to disclose these payments on export license applications submitted to the U.S. Department of State.

#### Implications for Individuals and Corporations

**Continued Trend of Aggressive Enforcement and Large Fines.** The BAE settlement signals a continuing trend of aggressive FCPA enforcement activity by the DOJ. At the recent American Bar Association National Institute on White Collar Crime conference in Miami, Florida, Lanny A. Breuer, Assistant Attorney General for the DOJ's Criminal Division, warned that the DOJ will

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continue to prosecute corporations where "the criminal conduct is egregious, pervasive and systemic, or when the corporation fails to implement compliance reforms, changes to its corporate culture, and undertake other measures designed to prevent a recurrence of the criminal conduct."

The substantial fine levied in the BAE case demonstrates the considerable power the DOJ has in the FCPA context. Notably, this \$400 million sanction did not punish substantive violations of the FCPA, but rather BAE's false statements about its FCPA compliance program. Indeed, the DOJ recognized in the criminal information filed against BAE that the company had introduced enhanced compliance policies and procedures in 2001. Nevertheless, because BAE's compliance program did not prevent further corrupt payments, BAE's previous statements that it would implement a compliance program that would ensure compliance with the FCPA and OECD Anti-Bribery Convention became the basis for criminal charges.

The government's novel approach to the charges brought against BAE is yet another example of the government using other statutes to prosecute conduct that the government believes amounts to FCPA violations.<sup>1</sup> This expansive enforcement effort by the DOJ could hold significant consequences for companies that regularly make statements to the government regarding FCPA compliance—for instance, in connection with applications for government contracts. Indeed, the sheer size of the BAE fine, as well as the use of a false statements charge to bring it about, underscores the breadth of the DOJ's arsenal in prosecuting overseas bribery and the considerable pressure on companies to settle rather than to fight such charges.

**Increased Cooperation with Foreign Authorities.** The BAE case also likely signals future increased cooperation between domestic and foreign authorities. The BAE settlement is the first coordinated

transatlantic settlement in a corporate bribery case. In the DOJ's press release, the DOJ thanked the United Kingdom for the "significant assistance" it provided and "further expresse[d] its gratitude to that office for its ongoing partnership in the fight against overseas corruption." For its part, the SFO called the settlements a "groundbreaking global agreement." Such international cooperation has significant implications for government investigations. For example, the DOJ may use its efforts to obtain evidence abroad as grounds to toll the statute of limitations. In addition, the use of European Union arrest warrants and increased cooperation between foreign and domestic authorities may facilitate extradition procedures.

**Compliance Programs under Increased Scrutiny.** The BAE case is also unique in that the sole exhibit to the information filed by the DOJ is the letter sent in 2000 to the then-secretary of defense in which BAE claimed that it would establish a compliance policy and procedures to meet the standards of the FCPA, U.K. anti-bribery laws, and the OECD Anti-Bribery Convention. The information alleges that a subsequent letter sent to the then-under secretary of defense represented that BAE had complied with the spirit and the letter of the statements made in the 2000 letter. The DOJ alleged, however, that contrary to these assertions, BAE's compliance program remained inadequate to satisfy all the statements made in the 2000 letter to the Department of Defense.

That BAE faced prosecution for not fully carrying out statements about its compliance program made in correspondence with the U.S. government suggests that companies and individuals may be subject to enforcement action for an increasingly wide array of statements and conduct. Moreover, the BAE case evinces the enhanced scrutiny the DOJ is applying to corporate compliance programs. Clearly, such programs must be more than empty policies; companies must adopt compliance programs that actually

work and are adhered to at every level of the organization.

Without question, the BAE settlement underscores the need for domestic and foreign corporations to engage legal counsel with criminal defense expertise to assist them in the creation and implementation of effective corporate compliance programs so that they may minimize the risk of running afoul of the United States' rigorous efforts to combat corruption in international business dealings.

For more information or any questions about the BAE prosecution or other recent developments regarding the Foreign Corrupt Practices Act, please contact Leo Cunningham (lcunningham@wsgr.com), Robert Gold (rgold@wsgr.com), Elizabeth Peterson (epeterson@wsgr.com), Lisa Prager (lprager@wsgr.com), or Michael Sommer (msommer@wsgr.com) in Wilson Sonsini Goodrich & Rosati's white collar criminal defense practice.



Wilson Sonsini Goodrich & Rosati  
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650 Page Mill Road  
Palo Alto, CA 94304-1050  
Tel: (650) 493-9300 Fax: (650) 493-6811  
email: [wsgr\\_resource@wsgr.com](mailto:wsgr_resource@wsgr.com)

[www.wsgr.com](http://www.wsgr.com)

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<sup>1</sup> As discussed in a previous WSGR Alert, the DOJ has also used the Travel Act in its efforts to prosecute FCPA-related violations. See "Department of Justice Evidences Trend Toward Combining FCPA and Travel Act Charges" (October 7, 2009).