



Benchmarking Your FCPA Compliance Program

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Agenda

- Emphasizing why anti-corruption compliance is important
- Understanding the recent VimpelCom settlement – the measuring rod for anti-corruption compliance programs
- Assessing what recent settlements teach us about potential gaps in anti-corruption compliance programs

WHY ANTI-CORRUPTION COMPLIANCE IS IMPORTANT

FCPA Statistics: Monetary Settlements

- Monetary Settlements (DOJ / SEC)
 - 2016: \$519 million (to date)
 - 2015: \$133 million
 - 2014: \$1.56 billion
 - 2013: \$731 million
 - 2012: \$259 million
 - 2011: \$509 million
 - 2010: \$1.8 billion
- Top Ten Settlement Already in 2016
 - Two changes in 2014, two changes in 2013

FCPA Statistics: Types of Settlements

- Corporate Settlements (DOJ / SEC)
 - 2015: 11 companies
 - 2014: 10 companies
 - 2013: 12 companies
 - 2012: 12 companies
 - 2011: 15 companies
 - 2010: 23 companies
- Individuals Charged by DOJ
 - 2015: 8 individuals
 - 2014: 10 individuals
 - 2013: 12 individuals
 - 2012: 2 individuals
 - 2011: 10 individuals
 - 2010: 33 individuals

FCPA Top Ten Settlements

1. Siemens (Germany): \$800 million (2008)
2. Alstom (France): \$772 million (2014)
3. KBR / Halliburton (U.S.): \$579 million (2009)
4. BAE (UK): \$400 million (2010)
5. Total SA (France): \$398 million (2013)
6. VimpelCom (Holland): \$397.6 million (2016)
7. Alcoa (U.S.): \$384 million (2014)
8. Snamprogetti Netherlands B.V. / ENI S.p.A (Holland/Italy): \$365 million (2010)
9. Technip SA (France): \$338 million (2010)
10. JGC Corporation (Japan): \$218.8 million (2011)

THE VIMPELCOM SETTLEMENT

Overview & Summary

- \$795 million settlement involving VimpelCom subsidiary
 - \$230.1 million to DOJ, \$167.5 million to SEC
 - \$387.5 million to Dutch regulators
 - Imposition of 3-year compliance monitor
- Allegations:
 - \$114 million in bribes over 8 years to high-ranking Uzbek government official responsible for regulating telecom industry
 - Payments disguised in corporate books
 - Certain VimpelCom management withheld information
- DOJ gave limited cooperation credit
- Civil lawsuits seeking \$850 million in forfeiture

Essential Elements to Compliance Program

- VimpelCom's deferred prosecution agreement requires that the company will review and strengthen its corporate compliance program
- Provides clear direction as to what every anti-corruption compliance program should address
- Same basic points since this began 10 years ago

High-Level Commitment

- Directors and senior management to provide “strong, explicit, and visible support and commitment”
- Tone at the top

Policies & Procedures

- Written and appropriately designed
- Applicable to all directors, officers and employees and, where necessary and appropriate, third parties
- Shall address:
 - Gifts
 - Hospitality, entertainment, and expenses
 - Customer travel
 - Political contributions
 - Charitable donations and sponsorships
 - Facilitations payments
 - Solicitation and extortion

Policies & Procedures (continued)

- Ensure system of financial and accounting procedures (including internal accounting controls) that provides reasonable assurance that:
 - Transactions are executed in accordance with management's general or specific authorization
 - Transactions are recorded so as to comply with GAAP (or other) and to maintain accountability for assets
 - Access to assets is permitted only in accordance with management's general or specific authorization
 - Recorded accountability of access is compared with existing assets in regular intervals

Periodic Risk-Based Review

- Policies developed pursuant to periodic risk assessments
 - Geographic organization
 - Interactions with government officials
 - Industrial sectors of operation
 - Involvement in joint ventures
 - Importance of permits and licenses to business
 - Degree of governmental oversight and regulation
 - Volume and importance of goods and people through customs and immigration
- Reviewed no-less than annually

Training and Guidance

- Ensure effective communication of policy and procedures
- Periodic and certifications
- Who:
 - All directors and officers
 - Employees in positions of leadership or trust
 - Employees in positions that require such training – internal audit, sales, legal, compliance, finance
 - Positions that otherwise pose a corruption risk
 - Where necessary and appropriate, agents and business partners
- Effective system for providing guidance or advice on anti-corruption program including on an urgent basis or in foreign jurisdiction

Internal Reporting and Investigation

- Effective system for directors, officers, employees and, where necessary and appropriate, agents and business partners to report violations of law or the company's compliance policies and procedures
 - Confidential, where possible
- Effective and reliable process with sufficient resources for responding to, investigating and documenting allegations of violations

Enforcement and Discipline

- Mechanisms to effectively enforce including appropriately:
 - Incentivizing compliance
 - Disciplining violations
- Disciplinary procedures to address violations
 - Consistent and fair
 - Without regard to position or importance
- Procedures to ensure:
 - Remediation
 - Prevention of new violations
 - Assessment when violations discovered so appropriate modifications can be made

Third-Party Relationships

- Appropriate risk-based due diligence and compliance procedures on all agents and business partners
 - Properly documented due diligence with respect to hiring and continued retention
 - Notice to agents of company's commitment to anti-corruption policies and procedures
 - Seeking reciprocal commitment from agent
- Where necessary and appropriate standard contractual provisions
 - Anti-corruption reps and undertakings to comply with laws
 - Rights to conduct audits
 - Rights to terminate for breach of such provisions

Mergers and Acquisitions

- Policies and procedures to conduct anti-corruption due diligence by legal, compliance and accounting personnel
- Ensure that anti-corruption compliance policy and procedures apply as quickly as is practicable to any new entity acquired
 - Train directors, officers, employees, agents and business partners on the policy and procedures
 - Where warranted, conduct an FCPA-specific audit as quickly as practicable
 - Integrate acquired company into compliance program

Monitoring and Testing

- Periodic reviews and testing designed to evaluate and improve anti-corruption compliance program
- Take into account relevant developments in the field and evolving international and industry standards

BENCHMARKING TO RECENT SETTLEMENTS

Gifts, Travel and Entertainment

Corporate Hospitality

- \$25 million SEC settlement with BHP Billiton (May 2015)
- Sponsored attendance of government officials at 2008 Beijing Summer Olympics
- Failure to “devise and maintain sufficient internal controls over its global hospitality program” connected to sponsorship of 2008 Beijing Olympics
 - Although Billiton “recognized that inviting government officials to the Olympics created a heightened risk of violating anti-corruption laws and the company’s own Guide to Business Conduct, [...] the internal controls it developed and relied upon in an effort to address this risk were insufficient.”
 - The controls failed to prevent Billiton from inviting “government officials who were directly involved in, or in a position to influence, pending contract negotiations, efforts to obtain access rights, regulatory actions, or business dealings affecting [Billiton] in multiple countries.”

Travel

- \$12.8 million SEC settlement with SciClone Pharmaceuticals (Feb. 2016)
- From 2007 to 2012, Chinese subsidiary gave money, gifts, and other things of value to healthcare professionals employed by state-owned hospitals in China
 - Purpose: obtain sales of pharmaceutical products
- Used local agencies to arrange travel and lodging for conferences that did not include legitimate educational purpose or that were minimal in comparison to recreational activities
 - Trips to “attend liver and oncology conferences in the United States” that involved significant sightseeing, including “travel to Las Vegas and Los Angeles with tours of the Grand Canyon or Disneyland”
 - Travel to a seminar in Japan on its product that included a half day of educational activities and six days of sightseeing such as Mt. Fuji

Hospitality: Gifts & Travel

- \$9.5 million SEC settlement with Flir Systems Inc. (April 2015)
- Allegations of improper gifts and travel expenditures for Saudi officials
 - 20-night “world tour” to Casablanca, Paris, Dubai, Beirut, New York City
 - Multiple New Year’s Eve trips to Dubai
 - Expensive watches

Human Resources Policies, Procedures and Training

Paid Internships

- \$14.8 million SEC settlement with financial institution (Aug. 2015)
- Involved hiring of 3 interns who were family members of foreign officials at Middle East sovereign wealth fund
 - Interns had weak qualifications
 - Below average performance evaluation
- SEC cited evidence of explicit intent that hiring decisions were intended to obtain or retain business
- The bank’s “system of internal accounting controls was insufficiently tailored to the corruption risks inherent in the hiring of client referrals, and therefore was inadequate to fully effectuate [its] stated policy against bribery of foreign officials.”
 - “Senior managers were able to approve hires requested by foreign officials with no mechanism for review by legal or compliance staff.”
 - Although the bank had in place an anti-corruption compliance policy, the bank’s compliance program “maintained few specific controls around the hiring of customers and relatives of customers, including foreign government officials.”

Permanent Employment & Internships

- \$7.5 million SEC settlement with Qualcomm Inc. (March 2015)
- Involved full-time and paid internship hiring of relatives of Chinese government officials responsible for selecting mobile technology products
- SEC cited emails discussing:
 - “Must place” or “special” hires
 - Parents “gave us great help for Q.C. new business development”
 - Hiring described as “quite important from a customer relationship perspective”
- One initial interview for permanent position resulted in “no hire” decision due to lack of “skills match” and failure to “meet the minimum requirements for moving forward with an offer”
 - Advocacy for hire: “I know this is a pain, but I think we’re operating under a different paradigm here than a normal ‘hire’/‘no hire’ decision tree” because Qualcomm asked special favor
- Another hire involved providing a \$75,000 research grant on behalf of foreign official’s son to retain Ph.D. program position
 - Son received internship and permanent employment despite expressed concerns about qualifications
 - Sent on business trip during Chinese New Year to visit parents

Internal Accounting Controls

Lax Internal Control Environment

- \$12 million SEC settlement with Mead Johnson Nutrition (July 2015)
- Involved conduct by Mead Johnson's Chinese subsidiary
 - Alleged \$2 million in improper payments paid to state-owned hospitals to market products
 - Failed to accurately record third-party funds used in connection with product marketing
- Subsidiary's financial results were consolidated into Mead Johnson's financial statements
 - Criticized for “lax internal control environment”

Lax Internal Control Environment (continued)

- \$9 million SEC settlement with Las Vegas Sands Corp. (April 2016)
- Involved purchasing sports team and building in China
 - Paid consultant referred to as a “beard” more than \$32 million without properly documenting purposes of payments
 - Employee received \$26,000 cash advance and \$86,000 cash reimbursement without proper authorization
- LVS “failed to implement controls to prevent tens of millions of dollars from being paid out without appropriate documentation or authorization.”

Disguising Kickbacks

- \$14.8 million DOJ / SEC settlement / plea with Analogic Corporation and foreign subsidiary (June 2016)
- Foreign subsidiary used inflated invoices from distributors to pay kickbacks to doctors at state-owned hospitals
- Only partial cooperation credit because was not entirely forthcoming at first

Failure to Flag Misconduct

- SAP VP in Panama, Garcia, created a “slush fund” by falsifying forms and giving an 82% discount on software licenses to a distributor
- “SAP’s internal controls failed to flag Garcia’s misconduct as he easily falsified internal approval forms and disguised his bribes as discounts.”
- “SAP had no requirements for heightened anti-corruption scrutiny for such large discounts.”
- SAP paid \$3.7 million in disgorgement of profits and prejudgment interest of \$188,896

Failure to Flag Hard-to-Find Misconduct

- \$14 million SEC settlement with multinational company (July 2016)
- China subsidiary acquired in 2005 was involved in bribes before acquisition
- Company cleaned house and instituted new compliance program
- Chinese employees deliberately circumvented the new controls and continued paying bribes
 - Company limited agents; sub created slush funds through vendors
 - Vendor payments in small amounts so low risk to Company
 - Global auditors did not truly understand transactions

Third Party Due Diligence

Use of Third Party in Profit-Sharing Scheme

- \$19 million SEC settlement with Japanese multinational corporation (September 2015)
- Allegation of profit-sharing scheme with company serving as front for African National Congress
 - Corporation awarded \$5.6 billion in government contracts in South Africa
 - Front company paid \$5 million in “dividends”
 - Additional \$1 million success fees paid to front company
- Corporation sold stake to front company for less than \$200,000 in 2005 and repurchased shares for \$4.4 million in 2014

Inadequate Compliance Procedures

- \$28 million SEC/DOJ settlement with PTC Inc. (February 2016)
- Policy and Procedures
 - Inadequate gift giving policies; not enforced; lack of audit staff for internal controls
- Periodic Risk-Based Reviews
- Enforcement and Discipline
- Third-Party Relationships
 - PTC’s subsidiaries relied on local third-party “business partners,” who arranged more than \$1 million in improper travel for Chinese government officials working for SOEs between at least 2006 to 2011

Post-Compliance Review Failures

- PTC failed to identify and stop the illicit payments to Chinese government officials and failing to take effective remedial measures *despite conducting compliance reviews in its Chinese subsidiaries during 2006, 2008 and 2010 that included investigating possible corruption involving its business partners*
- PTC and its subsidiaries failed to conduct adequate due diligence on its business partners, failed to enact and enforce an adequate compliance policy and program and failed to maintain adequate internal accounting controls

Mergers & Acquisitions

Pre- and Post-Acquisition Due Diligence

- \$16.2 million SEC settlement with Goodyear Tire & Rubber (Feb. 2015)
- Kenyan and Angolan subsidiaries paid bribes to foreign officials to obtain business
- SEC alleged failures:
 - To conduct “adequate due diligence” when it acquired the Kenyan subsidiary
 - To implement “adequate FCPA compliance training and controls after the acquisition”
- Goodyear had minority stake in Kenyan subsidiary since 2002, acquired majority stake in 2006, and divested ownership stake in 2013

DOJ UPDATE

New DOJ Compliance Counsel

- DOJ Fraud Section's newly-created compliance counsel position
- Attorney Hui Chen
 - Experience: in-house legal and compliance positions at Microsoft, Pfizer, and Standard Chartered Bank
- Purpose:
 - Not recognizing or instituting a “compliance defense”
 - Assess company's compliance program and test validity of claims about program
 - Guide prosecutors seeking remedial compliance measures (effectively tailor requirements for companies)

Criteria to Evaluate Compliance Program

- DOJ's new compliance counsel recently identified four criteria for evaluating the effectiveness of a compliance program:
 - **Addressing Risk** – Does the compliance program demonstrate thoughtful design to address current risks?
 - **Active Compliance** – How operational is the program (not a paper program)?
 - **Coordination** – How well are stakeholders working with each other?
 - **Resources** – How well is the program resourced?

DOJ's New Pilot Program

- One-year DOJ pilot program announced April 2016
- Purpose
 - Encourage companies to self-report FCPA violations
 - Formalize criteria for prosecutors to assess voluntary disclosures
- Mitigation credit where company meets program's "stringent requirements"
 - Fine reduction – up to 50% reduction
 - Reduced chance of compliance monitor
 - Possible declination of prosecution

Pilot Program: DOJ's Criteria

- Self-Disclosure
 - Voluntary, independent, timely, complete
- Cooperation
 - Full factual disclosure, proactive cooperation, facilitate interviews and third-party disclosure
- Timely & Appropriate Remediation
 - Effective compliance and ethics program
 - Corrective action & discipline
 - Additional steps

Recent DOJ Declinations

- In June 2016, the DOJ closed two investigations without prosecution
- DOJ emphasized the declinations were “consistent with the FCPA Pilot Program”
- Both cases involved foreign subsidiary payments to Chinese government officials
- DOJ’s rationale:
 - Prompt voluntary self-disclosure of misconduct
 - Thorough investigation
 - Fulsome cooperation, including to identify responsible individuals
 - Agreement to cooperate in ongoing investigations
 - Compliance program enhancements
 - Full remediation
 - Disgorgement to SEC

CONCLUSION

QUESTIONS & ANSWERS



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