

Government Contracts Blog

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2010 FCPA Year In Review

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Through enforcement, administrative action, and new legislation, the Foreign Corrupt Practices Act (“FCPA”) grew additional muscle and even sharper teeth in 2010. The U.S. government assessed nearly \$2 billion in FCPA-related penalties and fines in 2010, and announced eight of the top ten FCPA settlements of all time.

The following timeline highlights some of the major anti-corruption events of 2010 in the area of global anti-corruption:

1. The “Shot Show” Sting

On January 19, 2010, federal agents raided a Las Vegas trade show, arresting twenty-one individuals in the military products industry for alleged violations of the FCPA. The arrests resulted from an undercover operation wherein FBI agents posed as representatives of an African country and allegedly solicited promises of bribes in exchange for the award of lucrative government contracts. The DOJ trumpeted the sting operation and resulting arrests as “the largest single investigation and prosecution against individuals in the history of the DOJ’s enforcement of the [FCPA].”

2. SEC Task Force

Not to be outdone by the DOJ, the SEC kicked-off 2010 by creating a specialized FCPA unit led by SEC-veteran Cheryl J. Scarborough. The agency also expanded its FCPA capabilities by opening a San Francisco unit solely dedicated to FCPA enforcement. The decision to open the unit in San Francisco was reportedly driven by the presence of a large number of high-tech firms in the area who regularly do business in Asia. With China’s rapid ascension as a world economic powerhouse, and its reputation as a country with a high risk of corruption, the opening of the SEC’s San Francisco office likely signals that companies doing business in China, particularly in the technology sector, will be subject to increased scrutiny by the SEC.

3. BAE Settlement

On February 5, 2010, less than three weeks after the DOJ announced the results of the “Shot Show” sting operation, British defense industry giant, BAE Systems plc (“BAE”), announced that it would plead guilty to one charge of conspiring to make false statements to the U.S. government regarding its ongoing compliance with the FCPA. In connection with its guilty plea, BAE also agreed to pay a \$400 million fine – the largest of 2010, and the third-largest FCPA-related penalty of all time. Notably, the DOJ did not allege that BAE violated the FCPA or that BAE executives willfully looked the other way while their agents or subordinates violated the FCPA. Instead, the crux of the DOJ’s case appears to be that BAE failed to install a compliance program capable of detecting FCPA violations in the first place.

4. Daimler AG Settlement

On April 1, 2010, the DOJ announced that Daimler AG and a number of its subsidiaries had agreed to pay approximately \$185 million in disgorgements and fines to settle FCPA-related charges. The companies were alleged to have made improper payments in the form of “commissions,” delegation travel, and other gifts to Chinese government officials or their designees, in connection with substantial sales of commercial vehicles to Chinese government customers. Daimler AG’s case is significant because it illustrates the risks of doing business in China, where many, if not most, companies are state-owned or state-controlled and there is a well-established culture of “gift-giving” in business transactions.

5. UK Bribery Act

April 2010 also brought the passage of the UK Bribery Act (“UKBA”), which is likely to lead to major changes in the way companies with connections to the UK approach anti-corruption compliance. The UKBA is both broader and stricter than the FCPA, and there are some significant differences between the two statutes. Like the FCPA, the UKBA prohibits bribery of foreign officials. Unlike the FCPA, however, the UKBA also prohibits commercial bribery. Other important distinctions between the FCPA and UKBA include: (1) the UKBA provides for strict liability for companies that fail to implement “adequate procedures” to prevent bribery; and (2) the UKBA does not include an exception for so-called “facilitation payments” – payments used to speed up routine governmental functions that do not involve the discretion of a foreign official. Final implementation of the UKBA is expected this year, but has been delayed until the UK government issues final guidance as to what will constitute “adequate procedures” to prevent bribery.

6. Jumet Prison Sentence

Also in April 2010, a District Court in Virginia handed down the largest prison sentence in FCPA history. Charles Jumet was sentenced to serve an eighty-seven-month prison term after pleading guilty to conspiracy to violate the FCPA. Mr. Jumet was the president of a company that paid over \$200,000 in bribes to Panamanian officials to secure a twenty-year, no-bid contract to maintain lighthouses and buoys along Panama’s waterways. His colleague was sentenced to three years in prison in May 2010.

7. Snamprogetti Settlement

In July 2010, the DOJ announced that Snamprogetti Netherlands B.V. (“Snamprogetti”) and its parent company ENI S.p.A had agreed to pay \$365 million – the fourth largest FCPA settlement to date – to resolve FCPA charges stemming from Snamprogetti’s role in a multi-entity joint venture (“JV”) in Nigeria. The JV won four contracts worth more than \$6 billion to build a liquefied natural gas plant in Nigeria from 1995 to 2004, all of which were awarded by a state-controlled company. Snamprogetti allegedly authorized the JV to hire two agents to pay bribes to Nigerian officials to help win the contracts. With Snamprogetti’s settlement, the DOJ and the SEC announced that a total of \$1.28 billion in penalties has been assessed in connection with the JV. This case exemplifies the risks of partnering with JVs and other third-party agents operating in countries where corruption is common, and the need for companies to conduct due diligence on third parties with whom they conduct business, including potential JV partners.

8. Dodd-Frank Act

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”). The Act contains whistleblower provisions authorizing the government to pay rewards for “original” information related to violations of the securities laws. Under the Dodd-Frank Act, whistleblowers can receive between ten and thirty percent of any monetary recovery over \$1 million for FCPA violations. The SEC is expected to issue implementing regulations for the whistleblower provisions in the spring of 2011. The large penalties levied in FCPA cases will undoubtedly incentivize would-be whistleblowers to act upon information they encounter that could lead to an FCPA violation, creating an even more dangerous FCPA

environment.

9. Mendelsohn Steps Down

In September 2010, Mark Mendelsohn stepped down as Deputy Chief of the DOJ's Fraud Section, which houses the FCPA unit. During his term as Deputy, Mendelsohn presided over the greatest expansion of FCPA enforcement in the history of the statute. His successor, Charles Duross, is a DOJ insider who has been in the Fraud Section since 2006. While it remains to be seen exactly what influence Duross will have on the FCPA unit, it seems clear that he is unlikely to slow the ever-increasing pace of enforcement. It is also worth noting that the DOJ has continued to add new prosecutors to its FCPA unit, including prosecutors with expertise in gathering foreign evidence and the ability to try substantial criminal cases to verdict.

10. CB Richard Ellis Investigation

In October 2010, global real estate firm CB Richard Ellis ("CB") disclosed in an SEC filing the results of an internal investigation that found that CB employees had made payments for gifts and other entertainment to Chinese government officials, presumably to garner some business advantage. According to CB, it informed the DOJ and SEC of these payments in February 2010, and thereafter cooperated with the agencies and implemented unidentified "remedial measures." CB has stated that although the payments violated company policy, it does not believe that they create liability under the FCPA. Irrespective of the outcome of the investigation, this event is significant because it demonstrates that the DOJ and SEC are looking beyond the "usual suspects" of FCPA-enforcement, *e.g.*, defense, energy, and pharmaceutical firms, and that companies with an overseas presence in all industries are potential targets.

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