## Top Ten FCPA Enforcement Actions in 2010-Part I

The FCPA year in 2010 has been quite interesting. As the year is ending I wanted to put forth some of the more significant enforcement actions for the FCPA practitioner to provide lessons learned and perhaps some educational opportunities for all our clients. One of the more frequent criticisms of the Department of Justice regarding the FCPA is that there is very little case law guidance or interpretation. The FCPA Blog has opined that this has led to his ***Big Lesson*** which is:

> "I know there's practically no FCPA-related case law, no precedent to follow, no *stare decisis* to light the way. So the FCPA is pretty much what the enforcement agencies say it is. And that's what's so very different and difficult about it."

However in reviewing the past year, there is a fair amount of information which can be gleaned from FCPA enforcement actions. Additionally, it appears that the DOJ is tacitly responding to this criticism in some of the recent detailed compliance programs set forth in the Deferred Prosecution Agreement and Non-Prosecution Agreements that have been released in the second half of the year. With all of this in mind we submit for your consideration out Top Ten FCPA Enforcement Actions for 2010, Part I.

**1. Alliance One/Universal Corp**.-As noted by the FCPA Professor both the DOJ and the SEC, for the first time, issued a consolidated press release and consolidated an enforcement action against two unrelated companies. The companies involved in the investigations were the US companies, Alliance One and Universal Corporation, both in the tobacco merchant business. Alliance One's liability was predicated on successor liability for the FCPA transgressions of an entity it purchased. Both companies made improper cash payments, gifts and bribes in Central Asia and the Far East. The companies signed Non Prosecution Agreements and there were criminal pleas by individuals involved in the criminal activity. It is significant to note that both companies self-reported to the DOJ.

These two matters provide to companies in the midst of FCPA enforcement actions specific steps that should be implemented during the pendency of an investigation to present to the DOJ. Initially it should be noted that full cooperation with the DOJ at all times during the investigation is absolutely mandatory. Thereafter from the Alliance One matter, the focus was on accounting procedures and control of cash payments. From the Universal case, a key driver appears to be the due diligence on each pending international transaction, and subsequent full due diligence on each international business partner. Next is the management of any international business partner after due diligence is completed and a contract executed. Lastly is the focus on the Chief Compliance Officer position, emphasizing this new position throughout the organization and training, training and more training on FCPA compliance.

**2.** **Daimler**-As noted by the FCPA Professor, the DOJ stated in its Press Release on this enforcement action that Daimler (and three of its subsidiaries) "brazenly offered bribes in exchange for business around the world" and that Daimler "saw foreign bribery as a way of doing business." However, despite such statements, the DOJ (as described in more detail in the above linked post) did not charge Daimler with violating the FCPA's antibribery provisions. By resolving the case via a deferred prosecution agreement, Daimler will not have to plead guilty to anything. Indeed, the FCPA Professor termed this as "yet another bribery, yet no bribery case."

Additionally this matter stands for the proposition that a company can receive credit for self-disclosure under the sentencing guidelines even if it does not self report a possible FCPA violation. The DOJ investigation was started by a whistleblower report to the DOJ but Daimler nevertheless two-point reduction in its culpability. The US Sentencing Guidelines set the range of monetary fine as between $116 million - $232 million. However, the ultimate DOJ fine was approximately $94 million. Daimler did not voluntarily disclose the conduct at issue; nevertheless, the DOJ gave Daimler greater sentencing credit allowed for under the guidelines. The DOJ stated, "indeed, because Daimler did not voluntarily disclose its conduct prior to the filing of the whistleblower lawsuit, it only receives a two-point reduction in its culpability. The FCPA Professor noted that the DOJ "respectfully submit[ed] that such reduction is incongruent with the level of cooperation and assistance provided by the company in the Department's investigation."

**3.** **NATCO-**This matter continues the strict liability of a parent for books and records violations of a subsidiary. This matter was handled by the SEC and only resulted in a civil penalty, rather than a DOJ criminal enforcement. The case was unique in that it (according to the SEC Complaint) involved the creation and acceptance of false documents while paying extorted immigration fines and obtaining immigration visas in the Republic of Kazakhstan. "NATCO's consolidated books and records did not accurately reflect these payments." So from this case, one should glean that if a company pays money that is an extortion payment, it must accurately report such payments on its books and records. Otherwise such payment violates the books and records component of the FCPA.

One other factor in this case is that NATCO received a $65,000 fine and agreed to Cease and Desist Order. However the costs of the company's internal investigation cost was reported to be $11 million, "causing Natco cash-flow problems." So even if the result is a relatively small fine and civil injunction, with no criminal prosecution, the monetary cost to a company can be quite high.

**4.** **Nexus Technologies, Inc.**-In what the FCPA Professor termed as a "first" the defendants in this matter mounted a defense which challenged the DOJ's interpretation that employees of state-owned or state-controlled enterprises are "foreign official" under the FCPA. Unfortunately, the trial court judge dismissed the defendants' motion with no comment or legal analysis so it provided no guidance for the FCPA practitioner on what

may or may not constitute a "governmental official" under the FCPA. The interpretation defaults to what the FCPA Blog noted is that the FCPA is what the enforcement agencies say it is.

However not all was lost by the defendants in this matter as it also demonstrates the differences viewed by the Courts and DOJ regarding sentencing of FPCA defendants. The sentencing recommendations by DOJ and sentences passed down by Court were as follows:

**SENTENCING BOX SCORE**

| ***Defendant*** | ***DOJ Requested Sentence*** | ***Court Imposed Sentence*** |
|---|---|---|
| Nam Nguyen | 14 to 17 years | 16 months |
| An Nguyen | 7 to 9 years | 9 months |
| Kim Nguyen | 6 to 7 years | Probation |
| Joseph Lukats | 3 to 4 years | Probation |

**5. Nigerian Bribery Case**-the conclusion of enforcement actions against Technip ($338 million) and Snamprogetti and ENI ($365 million) bring the total fines and penalties paid by companies involved in this matter approximately $1.28 ***billion*** to-date. Additionally, this month, one UK citizen, Wojciech Chodan was extradited from the UK, brought to the US and has now pled guilty to violation of the FCPA. He faces 10 years in prison and is scheduled to be sentenced in February, 2011. Another UK citizen, Jeffery Tesler, has appealed his UK extradition order.

In an interesting development, the country of Nigeria recently charged former Halliburton CEO Dick Chaney regarding the bribery payments. Earlier this week the Nigerian government announced that the charges were dropped for payment of a report $250 million fine. However yesterday, Halliburton announced that the fine paid for the dismissal of the charges was "only" $32 million, plus $2.5 million in legal fess. The Wall Street Journal reported that Snamprogetti said Monday it settled with the Nigerian EFCC to pay a $32.5 million fine.