Chapter IV
Summing It All Up

Top Ten FCPA Enforcement Actions in 2010

Posted December 22, 2010

2010 has been quite an interesting year for Foreign Corrupt Practices Act (FCPA). 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 (DOJ) 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 (DPA) and Non-Prosecution Agreements (NPA) that have been released in the second half of the year. With all of this in mind we submit for your consideration our Top Ten FCPA Enforcement Actions for 2010.

1. Alliance One/Universal Corp. - As noted by the FCPA Professor both the DOJ and the Securities and Exchange Commission (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 NPA's 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

(CCO) 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 did not charge Daimler with violating the FCPA's anti-bribery provisions. By resolving the case via a DPA, 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 US 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 received a 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 a Cease and Desist Order. However, the costs of the company's internal investigation were 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 officials" 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 the DOJ and sentences passed down by the Court were as follows:

Sentencing Box Score (as of December 2010)

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 to approximately $1.28 ***billion*** to-date. Additionally, this month, one UK citizen, Wojciech Chodan, was extradited from the UK 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 Chief Executive Officer (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 fees. The Wall Street Journal reported that Snamprogetti said Monday it settled with the Nigerian Economic and Financial Crimes Commission (EFCC) to pay a $32.5 million fine.

6. Panalpina Settlements - In what the FCPA Blog termed a history making day "for the most companies to simultaneously settle FCPA-related violations", the worldwide logistics firm Panalpina and five of its oil-and-gas services customers resolved charges with the DOJ and SEC, and another customer settled with the SEC for a total fines and penalties of $236.5 million. The customers of Panalpina which settled were Shell Nigeria Exploration and Production Company Ltd., (SNEPCO), a Nigerian wholly-owned subsidiary of Royal Dutch Shell; Transocean, Inc.; Pride International Inc., and Pride Forasol S.A.S.; GlobalSantaFe [now owned by Transocean]; Tidewater, Inc., and Noble Corporation which did not receive a DPA but was granted a NPA.

However, more was announced yesterday than simply raw dollars. Each resolved enforcement action provided to the FCPA compliance practitioner significant information on the most current DOJ thinking on what constitutes a *best practice* FCPA program. Each of the DPA's released yesterday, included the same Attachment C entitled "Corporate Compliance Program". This same information was also attached to the Noble NPA as "Attachment B". Hence, this information is a valuable tool by which companies can assess if they need to adopt new or modify their existing internal controls, policies, and procedures in order to ensure that their FCPA compliance program maintains: (a) a system of internal accounting controls designed to ensure that a Company makes and keeps fair and accurate books, records, and accounts; and (b) a rigorous anti-corruption compliance code, standards, and procedures designed to detect and deter violations of the FCPA and other applicable anti-corruption laws. It is noted that in the Preamble to each Corporate Compliance Program that these suggestions are the "minimum" which should be a part of a Company's existing internal controls, policies, and procedures.

7. RAE Systems, Inc. - Lessons learned. Companies are fully liable for their joint ventures actions and that even with actual knowledge of FCPA violations, conduct during the DOJ investigation can result in a NPA. However, this liability need not lead to criminal sanctions as RAE received a letter of Non-Prosecution from the DOJ. The DOJ's letter to the RAE CEO and its legal counsel declined to prosecute the company and its subsidiaries for its admitted "knowing" of violations of the internal controls and books and records provisions of the FCPA. The DOJ entered into this NPA based upon four listed factors, which were detailed as follows: (1) timely and voluntary disclosure; (2) the company's thorough and "*real-time*" cooperation with the DOJ and SEC; (3) extensive remedial efforts undertaken by the company; and (4) RAE's commitment to periodic monitoring and submission of these monitoring reports to the DOJ.

Representatives from both the DOJ and SEC have been preaching the virtues and tangible benefits of self-disclosure and thorough cooperation with their respective agencies in any FCPA investigation or enforcement action. This RAE matter would appear to provide specific evidence of the benefits of such corporate conduct. The NPA reports that RAE had ***actual knowledge*** of FCPA violations yet no criminal charges were filed. Further, no ongoing external Corporate Monitor was required. Clearly RAE engaged in actions during the pendency of the investigation which persuaded the DOJ not to bring criminal charges.

Any company facing a FCPA enforcement action should study this matter quite closely and, to the extent possible, determine the steps that RAE engaged in or performed. The RAE enforcement action together with the Noble enforcement action which resulted also in a NPA, were reached with no external Corporate Monitor. No criminal penalties and no External Monitor are important examples of the tangible benefits for working closely with the DOJ in any FCPA enforcement matter.

8. Gerald and Patricia Green - Although this FCPA criminal enforcement action was tried by a jury in the summer of 2009, the two defendants, husband and wife Gerald

and Patricia Green were not sentenced until the summer of 2010. The trial judge's sentence would appear to reflect the growing disparity between the sentences that the DOJ requests and those handed down by the courts. The DOJ had originally sought a sentence of 25 years for Gerald Green (later reduced to requesting 10 years) and a 10 year sentence for Patricia Green. US District Judge George Wu sentenced the couple to 6 months each.

While this sentence reduction may result in more personal freedom, Judge Wu granted the DOJ's request for asset forfeiture, which means simply, as noted by the FCPA Blog, "any assets derived from proceeds traceable to a violation of the FCPA, or a conspiracy to violate the FCPA, can be forfeited". Each of the Greens owes $1,049,465 under the forfeiture, plus their shares in their company, Artist Design Corp., and its pension plan. The amount owed is so great that the DOJ is attempting to seize the home residence of the Greens because the forfeiture penalty cannot be fully satisfied without the proceeds of the home sale. The DOJ has obtained such complete forfeiture of the couples' assets in as much as they have filed *in forma pauperis* appeals.

9. Haitian Telecom - While this case generated much discussion in the FCPA world, particularly regarding an idea derived from an article in the Wall Street Journal entitled "*Democrats and Haiti Telecom*" that enforcement of the FCPA in Haiti should be suspended in the aftermath of the devastating earthquake which hit the island earlier this year. This was based on the fact that US companies simply could not do business in Haiti without violating the FCPA so they simply refuse to do so. To entice US companies to assist in the rebuilding efforts, the DOJ should suspend enforcement of the FCPA for some limited period of time. This idea was not seized upon by the DOJ.

While this debate was interesting, this case makes the Top 10 list because of what happened to the foreign officials who accepted the bribes. The FCPA only applies to bribe givers and not bribe recipients, the charges brought against the foreign officials who accepted the bribers were not FCPA charges, but rather a money laundering conspiracy charge. As reported by the FCPA Professor, these money laundering charges led to a guilty plea by Robert Antoine, a former Director of International Relations of Haiti Teleco responsible for negotiating contracts with international telecommunications companies on behalf of Haiti Teleco. He was sentenced to four years in prison. In addition, Antoine was ordered to serve three years of supervised release following his prison term, ordered to pay $1,852,209 in restitution, and ordered to forfeit $1,580,771.

10. Innospec - Fine and Penalty waiver for inability to pay? In March 2010, Innospec agreed to pay $40.2m in combined DOJ/SEC/SFO (UK Serious Fraud Office) fines and penalties for violating the FCPA and other laws. However, as noted by the FCPA Professor, it could have been worse. The SEC release noted that Innospec, without admitting or denying the SEC's allegations, was ordered to pay $60,071,613 in disgorgement, but because of Innospec's "sworn Statement of Financial Condition" all but $11,200,000 of that disgorgement was waived. The release states that "[b]ased on its financial condition, Innospec offered to pay a reduced criminal fine of $14.1 million to the DOJ and a criminal fine of $12.7 million to the SFO. Innospec will pay $2.2 million

to OFAC for unrelated conduct concerning allegations of violations of the Cuban Assets Control Regulations." As noted by the FCPA Professor, “Innospec got a pass on approximately $50 million.”

Top FCPA Investigations of 2010

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While enforcement actions can provide details of the most current thinking by the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) on Foreign Corrupt Practices Act (FCPA) compliance *best practices* the public information made available during these investigations can provide, to the FCPA, UK Bribery Act or other compliance professional, many opportunities for teaching points and lessons learned by others. So with the opportunity for many educational occasions in mind we present our favorite investigations of 2010.

1. **Avon - What is the Cost of Non-Compliance?**

As noted by the FCPA Professor, one of the significant pieces of information to come out of the Avon matter is the reported costs. As reported in the 2009 Annual Report the following costs have been incurred and are anticipated to be incurred in 2010:

Investigate Cost, Revenue or Earnings Loss	
Investigative Cost (2009)	**$35 Million**
Investigative Cost (anticipated-2010)	**$95 Million**
Drop in Q1 Earnings	**$74.8 Million**
Loss in Revenue from China Operations	**$10 Million**
Total	**$214.8 Million**

2. **Gun Sting Case - Organized Crime Fighting Techniques Come to FCPA Enforcement**

On January 18, 2010, on the floor of the largest annual national gun industry trade show in Las Vegas, 21 people from military and law-enforcement supply companies were arrested, with an additional defendant being later arrested in Miami. The breadth and scope was unprecedented. Assistant Attorney General for the Criminal Division of the US Department of Justice, Lanny Breuer, who led the arrest team, described the undercover operation as a “two-and-a-half-year operation”. The arrests represented the largest single investigation and prosecution against individuals in the history of the DOJ’s enforcement of the FCPA.

As explained in the indictments, one FBI special agent posed "as a representative of the Minister of Defense of a country in Africa (Country A), [later identified as Gabon] and another FBI special agent posed "as a procurement officer for Country A's Ministry of Defense who purportedly reported directly to the Minister of Defense". Undercover criminal enforcement techniques such as wire taps, video tapes of the defendants and a cooperating defendant were all used in the lengthy enforcement action. In a later

indictment, and seemingly unrelated to the "Africa" part of this undercover sting operation, allegations were included that corrupt payments were made to the Republic of Georgia to induce its government to purchase arms.

3. HP - Questions, Questions and More Questions

How does one begin to discuss HP's compliance year? From FCPA to Mark Hurd's very public departure for (alleged) sexual harassment, to the recent announcement, reported in the Wall Street Journal (WSJ), that the SEC is investigating Hurd in 'a broad inquiry that includes an examination of a claim the former chief executive officer shared inside information." However, we will focus on the FCPA matter which involves the alleged payment of an approximately $10.9 bribe to obtain a $47.3 million computer hardware contract with the Moscow Prosecutor's Office.

In an April 15, 2010, WSJ article, Mr. Dieter Brunner, a bookkeeper who is a witness in the probe, said in an interview that he was surprised when, as a temporary employee of HP, he first saw an invoice from an agent in 2004. "It didn't make sense," because there was no apparent reason for HP to pay such big sums to accounts controlled by small-businesses such as ProSoft Krippner, Mr. Brunner said. Mr. Brunner then proceeded to say he processed the transactions anyway because he was the most junior employee handling the file, "I assumed the deal was OK, because senior officials also signed off on the paperwork".

Why didn't HP self report?

The WSJ article reported that by December 2009, German authorities traced funds to accounts in Delaware and Britain. In early 2010, German prosecutors filed a round of legal-assistance requests in Wyoming, New Zealand and the British Virgin Islands, hoping to trace the flow of funds to new sets of accounts. Further, HP knew of the German investigation by at least December 2009, when police in Germany and Switzerland presented search warrants detailing allegations against 10 suspects. The New York Times, in an article dated April 16, 2010, reported that three former HP employees were arrested back in December 2009 by German prosecutors. Although it was unclear from the WSJ article as to the time frame, HP had retained counsel work with prosecutors in their investigation. Apparently, since the SEC only announced it had joined the German and Russian investigation last week, HP had not self-disclosed the investigation or its allegations to the DOJ or SEC.

Where were the SEC and DOJ?

On April 16, 2010, the FCPA Professor wondered in his blog if it was merely coincidence that a few weeks ago the US concluded a FCPA enforcement action against the Daimler Corporation, an unrelated German company, for bribery and corruption in Russia and now it is German and Russian authorities investigating a US company for such improper conduct in Russia. The Professor put forward the following query: is such an investigation "Tit for tat or merely a coincidence?" And much like Socrates, he

answered his own question with the musing “likely the later”. The WSJ LawBlog noted on April 16, 2010, that it would be somewhat unusual for the DOJ or SEC to stand by and watch European regulators conduct a sizable bribery investigation of a high-profile US company; phrasing it as “It’s like asking a child to stand still after a piñata’s been smashed open”.

In September, the WSJ reported that the HP bribery probe has widened and HP, itself, has announced that investigators have “now expanded their investigations beyond that particular transaction.” This original investigation pertained to an investigation of allegations that HP, through a German subsidiary, paid bribes to certain Russian officials to secure a contract to deliver hardware into Russia. The contract was estimated to be worth approximately $44.5 million and the alleged bribes paid were approximately $10.9 million. In a later 10-Q filing, HP stated that the investigation has now expanded into transactions “in Russia and in the Commonwealth of Independent States sub region dating back to 2000.” The WSJ noted that US public companies, such as HP, are only required to report FCPA investigations in SEC filings if they “are material for investors.”

4. Team Inc., - No *de minimis* Exception in FCPA

As reported by the FCPA Professor, in August 2009, Team Inc. disclosed that an internal investigation conducted by FCPA counsel "found evidence suggesting that payments, which may violate the Foreign Corrupt Practices Act (FCPA), were made to employees of foreign government owned enterprises." The release further noted that "[b]ased upon the evidence obtained to date, we believe that the total of these improper payments over the past five years did not exceed $50,000. The total annual revenues from the impacted Trinidad branch represent approximately one-half of one percent of our annual consolidated revenues. Team voluntary disclosed information relating to the initial allegations, the investigation and the initial findings to the U.S. Department of Justice and to the Securities and Exchange Commission, and we will cooperate with the DOJ and SEC in connection with their review of this matter."

There is no *de minim*is exception found in the FCPA there are books and records and internal control provisions applicable to issuers like Team. Thus, even if the payments were not material in terms of the company's overall financial condition, there still could be FCPA books and records and internal control exposure if they were misrecorded in the company's books and records or made in the absence of any internal controls.

In its 8K, filed on January 8, 2010, Team reported "As previously reported, the Audit Committee is conducting an independent investigation regarding possible violations of the Foreign Corrupt Practices Act (“FCPA”) in cooperation with the U.S. Department of Justice and the Securities and Exchange Commission. While the investigation is ongoing, management continues to believe that any possible violations of the FCPA are limited in size and scope. The investigation is now expected to be completed during the first calendar quarter of 2010. The total professional costs associated with the investigation are now projected to be about $3.0 million."

So the FCPA Professor posed the question:

"*A $3 million dollar internal investigation concerning non-material payments made by a branch office that represents less than one-half of one percent of the company's annual consolidated revenues*?"

And his answer: ***"Wow!"***

In August, 2010, when disclosing its interim financial results for the year, Team reported, "The results of the FCPA investigation were communicated to the SEC and Department of Justice in May 2010 and the Company is awaiting their response. The results of the independent investigation support management's belief that any possible violations of the FCPA were limited in size and scope. The total professional costs associated with the investigation were approximately $3.2 million."

So $50,000 in (possibly) illegal payments equate to over $3 million investigative costs, so far.

5. ALSTOM - Arrests in the Board Room

As reported by the FCPA Blog, the UK Serious Fraud Office (SFO) reported in dramatic fashion the arrest of three top executives of French industrial giant ALSTOM 's British unit. The three Alstom Board members were suspected of paying bribes overseas to win contracts. The SFO Press Release stated that "[t]hree members of the Board of ALSTOM in the UK have been arrested on suspicion of bribery and corruption, conspiracy to pay bribes, money laundering and false accounting, and have been taken to police stations to be interviewed by the Serious Fraud Office."

According to the release, search warrants were executed at five Alstom business premises and four residential addresses. The operation, involving "109 SFO staff and 44 police officers", is code-named "Operation Ruthenium" and centers on "suspected payment of bribes by companies within the ALSTOM group in the U.K." According to the release, "[i]t is suspected that bribes have been paid in order to win contracts overseas."

Alstom released a statement which said:

Several Alstom offices in the United Kingdom have been raided on Wednesday 24 March by police officers and some of its local managers are being questioned. The police apparently executed search warrants upon the request of the Swiss Federal justice. Alstom has been investigated by the Swiss justice for more than 3 years on the motive of alleged bribery issues. Within this frame, Alstom's offices in Switzerland and France have already been searched in the past years. Alstom is cooperating with the British authorities.

6. PBS&J - The Effect of an Ongoing FCPA Investigation in a Merger and Acquisition

As reported by the FCPA Blog, in what may be the first case of its kind, a US company that has no securities traded on an exchange but files periodic reports with the SEC disclosed an internal investigation into possible FCPA violations. The matter involved PBS&JJ Corporation, which in January, 2010, stated that it would not satisfy the filing deadline for its Annual Report on Form 10-K for the year ended September 30, 2009 "due to an internal investigation being conducted by the Audit Committee of the Board of Directors." The company said the purpose of the internal investigation "is to determine whether any laws have been violated, including the Foreign Corrupt Practices Act, in connection with certain projects undertaken by PBS&J International, Inc., one of the Company's subsidiaries, in certain foreign countries."

However, this was not the reason that PBS&J made our Top 10 list. In the spring and summer of 2010, PBS&J sought bidders for itself. One of the concerns was the ongoing and unresolved FCPA investigation. PBS&J whittled the bidders down to two finalists, Company A and Company B. Company B had a higher bid price but demanded that the merger agreement include additional closing conditions regarding the FCPA investigation and a definition of "Company Material Adverse Effect" that would have allowed Company B to terminate the merger agreement in the event of adverse developments in the FCPA investigation. PSB&J declined to provide this in the closing documents and so PBS&J took a lower stock price for its shareholders because of its unresolved FCPA investigation.

7. Schlumberger - Red Flags, Red Flags and More Red Flags

In October, the WSJ reported that the DOJ was investigating allegations of possible bribery in Yemen by Schlumberger Ltd., (SLB) in connection with SLB's 2002 agreement with the Yemen government to create a national exploration data-bank for the country's oil industry. The allegations involve a foreign business representative, Zonic Invest Ltd., which became involved in the 2002 Data Bank Development Project between SLB and Yemen's national oil company, the Petroleum Exploration and Production Authority (PEPA). Zonic's General Director is the nephew of the then and current President of Yemen, Ali Abdullah Saleh. From the WSJ article, it was not clear the precise business relationship between SLB and Zonic, for instance: whether Zonic was an agent of SLB, a joint venture partner or simply a contractor.

In the WSJ article there were several reported allegations which stand out as classic ***Red Flags*** in FCPA compliance policies. Initially, PEPA had urged SLB to hire Zonic as a go-between at, or near, the time the contractual negotiations were nearing conclusion. Second the data-bank project went forward after SLB "agreed to hire and pay Zonic a $500,000 signing bonus" then the contract between SLB and PEPA was concluded. Indeed, the General Director of Zonic was quoted as saying, "If it wasn't for Zonic, there would have been no data-bank project." Lastly, the WSJ article does not reference that any written contract was executed between SLB and Zonic for this $500,000 payment.

With as many ***Red Flags*** that may have been raised in the WSJ report of the actions and statements that transpired before the contract for the data-bank project was concluded between SLB and PEPA, there were several raised thereafter. After the contract was concluded, WSJ reported that internal SLB documents revealed that "Zonic wanted a roughly 20% cut of Schlumberger's profits from the project." While SLB did not agree to pay such percentage of profits outright, it was noted that SLB's documents stated that the Yemen country manager had "suggested that those amounts could be compensated [to Zonic] through services." These services were said to include providing personnel to the project, networking, furniture and computer hardware. Payments for such services were made, even though there was no contract between SLB and Zonic, from 2002 to 2004. A contractual relationship between the parties was established in 2004 and lasted until at least 2007. The total amount paid by SLB to Zonic was reported to be $1.38 from 2003 to 2007. However, with regards to the services and products supplied by Zonic to SLB, the WSJ noted that some were "above market rate" and others were unnecessary; specifically noting that over $200,000 was paid for certain computer hardware, "although Schlumberger itself was among the leading providers of such hardware." The Daily Finance Blog reported, on October 8, 2010, that Zonic did not provide some of the services for which it was paid.

8. CB Richard Ellis - No Business or Industry is Immune from the FCPA

In October, CB Richard Ellis (CBRE), global real estate firm disclosed possible FCPA violations related to its operations in China. As reported by the FCPA Blog, the Company detailed in a SEC filing that its employees made payments for entertainment and gifts to Chinese government officials, which were discovered during an internal investigation. The Company said in the filing that it has "As a result of an internal investigation that began in the first quarter of 2010, …determined that some of its employees in certain of its offices in China made payments in violation of Company policy to local governmental officials, including payments for non−business entertainment and in the form of gifts." The payments CBRE discovered are minor in amount and believes relate to only a few discrete transactions involving immaterial revenues. CBRE also said that it had self-disclosed the payments to the DOJ and SEC in February, 2010. It has been cooperating with the agencies and has taken other unspecified "remedial measures."

As reported by the FCPA Professor, CBRE also reported a second investigation, which began in the third quarter of 2010. It was labeled as an "internal investigation, with the assistance of outside counsel, involving the use of a third party agent in connection with a purchase in 2008 of an investment property in China for one of the funds the Company manages through its Global Investment Management business. This investigation is ongoing and at this point the Company is unable to predict the duration, scope or results thereof. In light of the Company's cooperation with the DOJ and the SEC as described above, the Company voluntarily notified both agencies of this separate internal investigation and will report back to them when the Company has more information."

Most businesses believe that the DOJ and SEC target industries or sectors which work traditionally in countries where corruption is perceived to be endemic, such as the energy sector. However, this CBRE investigation clearly demonstrates that any company which does business overseas needs to have a full FCPA compliance program in place.

9. Dalian - Welcome to the (FCPA) Club

In what the FCPA Professor termed the first focus of a FCPA inquiry on a China-based issuer, the Chinese company Dalian disclosed in an SEC filing that it was notified that the SEC was "conducting a formal investigation relating to the Company's financial reporting and compliance with the Foreign Corrupt Practices Act for the period January 1, 2008 through the present. The Company is cooperating with the SEC's investigation. It is not possible to predict the outcome of the investigation, including whether or when any proceedings might be initiated, when these matters may be resolved or what if any penalties or other remedies may be imposed."

As reported in the WSJ, the DOJ and the SEC have never charged a listed Chinese company. At least two Chinese subsidiaries of US issuers, DaimlerChrysler China Ltd., now known as Daimler North East Asia Ltd., and DPC (Tianjin) Co. Ltd., a medical products company, have settled foreign bribery charges with the agencies. But now we have the first Chinese issuer. All we can say is to quote the FCPA Professor, "*Welcome to the Club*".

10. SciClone - Hell Hath no Fury like a SEC Subpoena

The pharmaceutical company SciClone had a fairly tumultuous August and September. It included the following:

August 10th - Shares of the Company as low as 40% down from the previous day's close, closing down 31.9%. Levi & Korsinsky, The Law Offices of Howard G. Smith LLP, the law firm of Kahn Swick & Foti, LLC, and the law firm of Roy Jacobs & Associates all announced that they were investigating SciClone on behalf of shareholders for possible violations of state and federal securities laws.

August 11th - The law firms of Pomerantz Haudek Grossman & Gross, Statman, Harris & Eyrich, Goldfarb Branham and Finkelstein Thompson all announced that they were investigating claims on behalf of investors of SciClone to determine whether it has violated federal securities laws.

August 12th - The law firm of Robbins Umeda announced that it commenced an investigation into possible breaches of fiduciary duty and other violations of the law by certain officers and directors at the Company.

August 13th - The law firm of Kahn Swick & Foti announced that the firm has filed the first securities fraud class action lawsuit against SciClone in the United States District Court for the Northern District of California.

August 19th - The law firms of Barroway Topaz Kessler Meltzer & Check and Brower Piven both announced that they had filed class action lawsuits in the United States District Court for the Northern District of California on behalf of purchasers of the securities of SciClone and purchasers of the common stock of SciClone.

August 20th - The law firm of Kendall Law Group announced an investigation of SciClone for shareholders. Unfortunately, another class action law suit was filed, this time by the law firm of Ryan & Maniskas.

August 28th - The law firm of Roy Jacobs & Associates (again) announced that it was investigating SciClone for potentially violating the federal securities laws.

September 7th - The Shuman Law Firm announced that it had filed a class action lawsuit against the Company.

September 8th – The law firm of Kaplan Fox & Kilsheimer announced that it had filed a class action suit against SciClone.

September 16th - The law firm of Strauss & Troy announced that it had filed a class action lawsuit against SciClone for potential violations of state and federal law.

September 23rd - The law firm of Lieff Cabraser Heimann & Bernstein announce that class action lawsuits have been brought on behalf of purchasers of the common stock of SciClone.

So what did SciClone actually do? The FCPA Professor reported that on August 9th, SciClone announced that it had been contacted by the SEC and was advised that the SEC has initiated a formal, non-public investigation. In connection with this investigation, the SEC had issued a subpoena to SciClone requesting a variety of documents and other information. The subpoena requested documents relating to a range of matters including: interactions with regulators and government-owned entities in China, activities relating to sales in China and documents relating to certain company financial and other disclosures. On August 6, 2010, the Company received a letter from the DOJ indicating that the DOJ was investigating FCPA issues in the pharmaceutical industry generally, and had received information about the Company's practices suggesting possible violations.

During SciClone's August 9th earnings conference call, the Company President and Chief Executive Officer Friedhelm Blobel stated that SciClone "intends to cooperate fully with the SEC and DOJ in the conduct of their investigations, and has appointed a special committee of independent directors to oversee the Company's efforts." Blobel noted that "as far as timing is concerned, the lawyers tell us that these investigations typically are long lasting." We would opine that his lawyers got that point "spot on".

Looking Back – Top FCPA Issues from 2010

Posted December 31, 2010

We conclude our blog this year with some of our favorite Foreign Corrupt Practices Act (FCPA) issues that have arisen or were discussed in 2010.

The following list is not exhaustive but is designed to supplement our prior posts on our top enforcement actions and investigations from 2010 with other issues we felt were of importance to the FCPA compliance and ethics practitioner.

I. Amendments to the FCPA

At what the FCPA Blog termed "an unprecedented investigation into the Department of Justice's (DOJ) enforcement of the Foreign Corrupt Practices Act (FCPA)", in a hearing on November 30, 2010, entitled the "*Examining Enforcement of the Foreign Corrupt Practices Act*", before the US Senate Judiciary Committee, Subcommittee on Crime and Drugs, three panelists Butler University Professor Michael Koehler, and attorneys Andrew Wiessmann, of Jenner and Block, and Michael Volkov, of Mayer Brown, presented proposed amendments to the FCPA.

Professor Michael Koehler (a/k/a The FCPA Professor)
Professor Koehler focused on two issues; (1) the lack of individual prosecutions; and (2) what he believes is an over-expansive definition of foreign governmental official. The DOJ's theory of prosecution was based on the claim that employees of alleged [state-owned enterprises] were "foreign officials" under the FCPA – an interpretation Professor Koehler believes is contrary to Congressional intent. Prosecuting individuals is a key to achieving deterrence in the FCPA context and should thus be a "cornerstone" of the DOJ's FCPA enforcement program. He argued that the answer is not to manufacture cases, or to prosecute individuals based on legal interpretations contrary to the intent of Congress in enacting the FCPA while at the same time failing to prosecute individuals in connection with the most egregious cases of corporate bribery.

Michael Volkov
Attorney Michael Volkov advocated the adoption of a limited amnesty program for corporate self-compliance with the FCPA. Volkov's proposal consists of the following elements:

1. Participating company agrees to conduct a full and complete review of the company's FPCA compliance program for the five previous years.
2. This internal review is to be conducted, jointly, by a major accounting firm or specialized forensic accounting firm and a law firm.
3. The company agrees to disclose the results of the legal-accounting audit to the DOJ, Securities and Exchange Commission (SEC), its investors and the public.

4. If the company discovers any FPCA violations in the audit, the Company agrees to take all steps to eliminate the violation(s) and implement appropriate controls to prevent further violations.
5. The company would subject itself to an annual review for five years to ensure that FCPA compliance was maintained.
6. The company would retain a person similar to an independent FCPA compliance monitor who would annually certify to the DOJ and SEC that the company was in FCPA compliance.
7. In exchange for this, both the DOJ and SEC would agree not to initiate any enforcement actions against a company during this period except in the situation where a FCPA violation was found and it "rose to ***flagrant*** or ***egregious*** levels."

Andrew Wiessman

Attorney Andrew Wiessmann testified about 2 of his 5 proposed amendments to the FCPA (the full five proposed amendments are set out in Whitepaper entitled "*Restoring Balance-Proposed Amendments to the Foreign Corrupt Practices Act*"). They were (1) to create a compliance defense available to a company if it has an adequate compliance program, similar to the "*adequate procedures"* defense available under the UK Bribery Act; and (2) to limit the legal doctrine of *respondeat superior* liability where a company can demonstrate that it took specific steps to prevent the offending employee's actions.

Under this proposal, Wiessmann believes that companies will increase their compliance with the FCPA because they will now have a greater incentive to do so. He envisions a defense similar to the "*adequate procedures*" defense, noted in the UK Bribery Act, where companies will be protected if a rogue employee engages in corruption and bribery despite a company's diligence in pursuing a FCPA compliance program; and lastly "it will give corporations some measure of protection from aggressive or misinformed prosecutors, who can exploit the power imbalance inherent in the current FCPA statute—which permits indictment of a corporation even for the acts of a single, low-level rogue employee—to force corporations into deferred prosecution agreements."

Most interestingly, the hearing began with the Subcommittee Chairperson, Senator Arlen Specter, questioning the DOJ's policy of obtaining large fines from corporations, rather than prosecuting individuals, to deter violation of the law. He specifically cited the example of the enforcement action against Siemens Corp., which resulted in a fine of $1.6 billion, yet had no individual prosecutions. He also pointed to the examples of BAE which paid a fine of $400 million and the Daimler Corporation which paid a fine of $185 million and subsequently there have been no individuals prosecuted from either of these corporations. Senator Specter posed the question to the DOJ representative at the hearing, Greg Andres, as to whether the imposition of fines simply was viewed by companies as a cost of doing business. Senator Specter's statements were clearly in opposite to the testimony of the three witnesses who seemed to be calling for more defenses, greater clarity and an amnesty program.

James McGrath

Another practitioner, Cleveland attorney James McGrath, also weighed in with a proposal for an amendment to respond to what he called "seismic shift in the government's perception of its role" regarding internal company FCPA investigations. Responding to Lanny Breuer's advise that when a possible FCPA violation has been discovered, a corporation should "seek the government's input on the front end of its internal investigation", McGrath proposed an amendment to the FCPA that would expressly prohibit requiring a company to immediately involve the DOJ at the outset of the internal investigation process as mandatory for receiving cooperation credit under the US Sentencing Guidelines. He argued that for those companies that do invite the government in as investigatory partners from the beginning, there should be some transactional or use immunity -- or at least some limitation on penalties and sanctions -- for other wrongs uncovered during the course of the FCPA investigation in recognition of their good-faith efforts to cooperate with the government. Such legislation amending the FCPA would protect the balance of interests in corporate criminal and civil prosecutions already struck by the US Sentencing Guidelines.

II. Bribery Act

Q: Why is a UK law on our Top FPCA issues for 2010?
A: Because it is a ***game changer.***

Passed in April 2010 and set to become effective on April 1, 2011, the UK Bribery Act represents what former DOJ prosecutor and now private practitioner Mark Mendelsohn is quoted in the Wall Street Journal to have said "is the FCPA on steroids." In the December 28, 2010 article entitled "*U.K. Law On Bribes Has Firms In a Sweat",* reporter Dionne Searcey indicated that the Bribery Act replaces several old British statutes and codifies in one location, that country's laws against bribery in the commercial context. Although Searcey called the law's scope "murky" the UK Ministry of Justice has released preliminary guidance on a key component of the Bribery Act; what may constitute an adequate compliance program.

This is important because there is one affirmative defense listed in the Bribery Act and it is listed as the "*adequate procedures*" defense. The Explanatory Notes to the Bribery Act indicate that this narrow defense would allow a corporation to put forward credible evidence that it had adequate procedures in place to prevent persons associated from committing bribery offences. The legislation required the UK Ministry of Justice to publish guidance on procedures that relevant commercial organizations can put in place to prevent bribery by persons associated with their entity. The Ministry of Justice published its guidance in September and took comments from interested parties. The final guidance is scheduled to be made available in early 2011. This guidance may well set the new worldwide *best practices* for a corporate anti-bribery and anti-corruption program.

- In addition to providing substantive guidance on what may constitute the basis for the only affirmative defense under the Bribery Act, there are several substantive differences between the FPCA and the UK Bribery Act which all companies should understand. The Bribery Act:

- has no exception for facilitation payments.
- creates strict liability of corporate offense for the failure of a corporate official to prevent bribery.
- specifically prohibits the bribery or attempted bribery of private citizens, not just governmental officials.
- not only bans the actual or attempted bribery of private citizens and public officials but all the receipt of such bribes.
- has criminal penalties of up to 10 years per offense not 5 years as under the FCPA.

The Bribery Act is a significant departure for the UK in the area of foreign anti-corruption. It cannot be emphasized too strongly that the Bribery Act is significantly stronger than the FCPA. The Bribery Act provides for two general types of offence: bribing and being bribed, and for two further specific offences of bribing a foreign public official and corporate failure to prevent bribery. All the offences apply to behavior taking place either inside the UK, or outside it provided the person has a "close connection" with the UK. A person has a "close connection" if they were, at the relevant time, among other things, a British citizen, an individual ordinarily resident in the UK, or a body incorporated under the law of any part of the UK. Many internationally focused US companies have offices in the UK or employ UK citizens in their worldwide operations. This legislation could open them to prosecution in the UK under a law similar to, but stronger than, the relevant US legislation.

One positive development from the Bribery Act is that it does away with any legal question of "who is a foreign governmental official" which is often a question under the FCPA. The DOJ uses other legislation, such as the Travel Act, which can be used to ban commercial bribery generally, to back corrupt actions made to a foreign person who is not a governmental official, into an FCPA violation. The Bribery Act simply bans all commercial bribery. All US companies with UK subsidiaries or UK citizens as employees, needs to understand how this law will impact their operations and should integrate the Bribery Act's *adequate procedures* into their overall compliance and ethics policies sooner rather than later.

III. FCPA Based Litigation

1. Your Dog Bit Me – Alba

As reported by the FCPA Blog, the Aluminum Bahrain BSC., known as Alba, is majority-owned by the government of Bahrain. It has filed two lawsuits against its own suppliers, alleging corruption and fraud against it by the suppliers. In the first suit, Alba sued Alcoa Inc., its long-time raw materials supplier, for corruption and fraud. The suit, in Federal court in Pittsburg, alleged that over a 15-year period Alba was overcharged $2 billion for materials. This money, according to the suit, was initially paid to overseas accounts controlled by Alcoa's agent, London-based Victor Dahdaleh, and some was then used to bribe Alba's executives in return for supply contracts. In the second suit, Alba

claimed that the Japanese trading company Sojitz Corp., and its US subsidiary paid $14.8 million in bribes to two of Alba's employees in exchange for access to metals at below-market prices. Alba sought money damages in both suits. An interesting development in both suits has been that the DOJ intervened saying discovery could interfere with the governments' own investigation into potential criminal wrongdoing, including possible violations of the FCPA.

2. How Fast Can You Get to the Courthouse – SciClone

SciClone is the most recent example of a fast growing trend that occurs when some type of FCPA investigation is announced, of law firms pouncing with lawsuits claiming securities violations before the investigations are concluded. As reported by the FCPA Professor, on August 9th, SciClone announced that it had been contacted by the SEC and was advised that the SEC had initiated a formal, non-public investigation. In connection with this investigation, the SEC had issued a subpoena to SciClone requesting a variety of documents and other information. The subpoena requested documents relating to a range of matters including interactions with regulators and government-owned entities in China; activities relating to sales in China and documents relating to certain company financial and other disclosures. On August 6th, 2010, the Company had received a letter from the DOJ indicating that it was investigating FCPA issues in the pharmaceutical industry generally, and had received information about the Company's practices suggesting possible violations. Within the week, its stock dropped over 31%. Within one week, 5 law firms announced that they were investigating the company for potential securities laws investigation and within 2 weeks, seven different law firms had filed class actions suits against the company for securities violations.

3. Don't Do as I Do, Do as I Say - Noisy Exits

This past year brought a growing trend for terminated employees to file suit claiming that they were fired for either (1) reporting allegations of conduct violative of the FCPA or (2) refusing to engage in conduct which would violate the FCPA.

A recent example of the former was reported by the FCPA Professor in a post entitled "*Yet Another Noisy Exit"*. In this matter, the former Director and Controller of Mexico-based Sempra Global, Rodolfo Michelon, was terminated by the company in March 2010. He later alleged that he discovered conduct by the company in Mexico which violated the FCPA; he subsequently reported this to the company and was fired for his efforts. In a California state court suit, he claimed that "The termination of the Controller employment was not only in retaliation for Michelon's complaints, but it was also meant to keep Michelon from reporting the frauds and bribes to governmental, law enforcement officials." The Company vehemently denied these allegations, responding, as reported in the San Diego Tribune, that Michelon was a "disgruntled ex-employee attempting to cash in by making 'outlandishly false claims and misrepresentations' after being let go in a routine reorganization." The company also noted that it had investigated the allegations and found them to be "without merit."

An example of the later claim was brought by Steven Jacobs, the former President of Macau Operations for Las Vegas Sands Corp., until his termination in July 2010. In a suit against the Las Vegas Sands Corp., alleging breach of contract and tort-based causes of action, Jacobs alleged, among other things, that he was ordered, but refused, to use improper leverage and undue influence on certain Chinese governmental officials so as to obtain favorable treatment for his employer in China. Additionally, he alleged that he was required "to use the legal services of a Macau attorney [...][an individual media is reporting as a member of a Chinese local government executive council] despite concerns that [the individual's] retention posed serious risks under the criminal provisions of the United States code commonly known as the Foreign Corrupt Practices Act ('FCPA')." As noted by the FCPA Professor the company has stated, "While Las Vegas Sands normally does not comment on legal matters, we categorically deny these baseless and inflammatory allegations."

4. Law Students Enter the FCPA Debate

Two law students blogged about law review articles, scheduled to be published in 2010, which greatly enhanced the FCPA world in the past year.

UCLA student Kyle Sheahen explored the issue of affirmative defenses under the FCPA in an article entitled "*I'm Not Going to Disneyland: Illusory Affirmative Defenses Under the Foreign Corrupt Practices Act*". In his paper, he sets forth his proposition that FCPA enforcement actions provide "uneven indicators or what conduct the government considers covered by the defense. Consequently, in the absence of authoritative judicial interpretation or clear regulatory guidance, corporate managers are required to make educated guesses as to whether contemplated payments will qualify as "bona fide promotional expenses."

Bruce Hinchey discussed his upcoming publication, "*Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements*," which analyzes the differences between bribes paid and penalties levied against companies that do and do not self-disclose under the FCPA. Using a regression analysis, Hinchey concluded that companies which did voluntarily self-disclose paid higher fines than companies which did not. He concluded his post by noting that this evidence was contrary to the conventional wisdom that a company receives a benefit from self-disclosure and such evidence would "raise questions about whether current FCPA enforcement is fundamentally fair".

While we disagreed with some of the conclusions of both Sheahan and Hinchey, we found their contributions enhanced the FCPA discussions for the compliance practitioner. To have law students penning authoritative law review articles signals an upcoming group of lawyers who will bring a passion to the FCPA debates in the future. We wish them both well as they enter the FCPA fray as attorneys.

So we leave this most eventful FCPA year of 2010 and move into 2011. With all we have learned in the past year, the only thing we can say with certainty is "*more will be revealed"*.

We appreciate the support of all readers, contributors, commentators and critics of our blog. A very Happy and Safe New Year's to all.

Suspension of FCPA in NOT the Solution

Posted March 30, 2010

Should enforcement of the Foreign Corrupt Practices Act (FCPA) be suspended for those US companies now working in Haiti? This topic has been in discussion for a few weeks. It began with a statement by Wall Street Journal editorial board member Mary Anastasia O'Grady in a piece entitled "*Democrats and Haiti Telecom*". Ms. O'Grady cited "an American entrepreneur" for the quote "We did not bother with Haiti as the Foreign Corrupt Practices Act precludes legitimate U.S. entities from entering the Haitian market. Haiti is pure pay to play".

This *"pay to play"* statement led George Mason University Professor Tyler Cowen, writing in the Marginal Revolution Blog, to write "one of the best ways to help Haiti" is to "pass a law stating that the Foreign Corrupt Practices Act does not apply to dealings in Haiti. As it stands right now, U.S. businesses are unwilling to take on this legal risk and the result is similar to an embargo. You can't do business in Haiti without paying bribes". Professor Cowen's statement led Eric Lipman, writing in the Legal Blog Watch, to follow this up with "[i]t should not be necessary to suspend enforcement of an anti-corruption law to enable U.S. companies to participate, but, realistically speaking, is it justified in this case to look the other way for a time?".

Responding to the suggestion that FCPA enforcement should be suspended in Haiti, the FCPA Professor articulated three reasons the law should not be suspended in Haiti. First the FCPA applies only to foreign governmental officials so not all business dealings in Haiti are covered by the FCPA. Second, empirical evidence suggests that foreign investment will be high in countries as Haiti if their markets are lucrative, but Haiti's is not. Third, is Haiti's 2009 ranking in Transparency International's Corruption Perceptions Index which demonstrates that it is a country where corruption is rampant.

As the lead editorial in its Sunday, March 28 edition, the New York Times urged that Haiti "will need to sweep out the old, bad ways of doing things, not only those of the infamously corrupt and hapless government, but also of aid and development agencies, whose nurturing of Haiti has been a manifest failure for more than half a century". The piece suggested the following ideas to further this goal: Transparency, Accountability and Effectiveness; Haitian Involvement, Self-Sufficiency; Tapping the Diaspora and De-centralization as some of the keys for a successful rebuilding of Haiti. These ideas applied to groups both inside the country and out. But it is clear that the Times did not suggest that cow-towing to a "*pay to play state*" by suspending the enforcement of the FCPA was a way to move forward.