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Enforcement of the Foreign Corrupt Practices Act: The Hits Keep Coming

On January 19, 2010, the Department of Justice pulled back the curtain on its largest prosecution of individuals in the history of the Foreign Corrupt Practices Act (“FCPA”). About 150 agents from the Federal Bureau of Investigation arrested 22 individuals and executed 14 search warrants in the United States and United Kingdom. Those arrested are believed to represent about 16 companies involved in the foreign bribery investigation. Each person is alleged to have been involved in a scheme to pay bribes to a minister of defense in exchange for sales of military and law enforcement equipment. Undercover FBI agents posed as African defense officials as part of the operation.

The African FCPA sting illustrates the proactive and aggressive law enforcement methods being used to detect and investigate foreign bribery. There can be little doubt that self-reporting has contributed to the current resurgence of FCPA enforcement. But recent years have seen an increase in the use of police methods once associated with organized crime and drug trafficking. The FBI now has agents dedicated to FCPA investigation, and they more commonly use wiretapping, funds tracing, informants, and other customary means of collecting investigative information. The Africa sting introduces the undercover operation as a tool in FCPA enforcement.

In November 2009, the DOJ revealed 130 open FCPA cases, up from the 84 investigations pending around the same time in 2008. Even with more new FCPA actions, they continue to illustrate many of the past lessons learned. Some of the common themes of FCPA enforcement include the following.

- **People go to jail.** Record-setting corporate monetary penalties should not overshadow the fact that individual criminal prosecutions have been a priority for the DOJ. Whether or not a company is charged criminally, cases of foreign bribery often yield indictments against individuals who pay bribes and those who facilitate them. And these people not only get indicted and convicted, they often go to prison, as evidenced by the most recent sentences handed down to FCPA violators. On January 28, 2010, Judge Lake of the Southern District of Texas sentenced two former executives to 15 months and 12 months respectively for their parts in a scheme to bribe Nigerian officials. These prison sentences were imposed even though the two helped the government in other prosecutions.
- **Violation of the FCPA’s accounting provisions can occur without paying a bribe.** The FCPA’s antibribery and accounting provisions operate independently. Violating one is not predicated on violating the other. On January 11, 2010, the Securities and Exchange Commission charged Houston-based NATCO Group, Inc. with violating the FCPA’s accounting provisions when one of its subsidiaries “created and accepted false documents while paying extorted immigration fines” in Kazakhstan. Although the payments—which the SEC acknowledged were *extorted*—might not have been illegal bribes, the company was on the hook for FCPA violations because its subsidiary falsely recorded the purpose of the payments. The company paid a civil penalty of \$65,000.
- **Cash payments are not required to run afoul of the FCPA.** The FCPA prohibits the payment of money or “anything of value” to foreign officials. At the end of 2009, California-based UTStarcom Inc. agreed to pay \$3 million to settle FCPA charges related to its payment of travel and other things of value. According to litigation documents, the company paid for employees of Chinese government-owned telecommunications companies to travel to popular U.S. tourist destinations and recorded the expenses as “training” expenses, although no training occurred.

- **There is no safe place to pay a bribe.** FCPA enforcement continues in geographic regions considered hotspots for corruption. However, compliance efforts should not ignore Western Europe and other places traditionally thought safer for international business. The FCPA reaches worldwide, and businesses can get into trouble even in places that score well on international corruption indices. For example, Leo Winston Smith is currently awaiting sentencing in the Central District of California for his part in a scheme to pay an official in the United Kingdom's Ministry of Defense through a sham consultancy.
- **The FCPA sweeps broadly.** The FCPA itself reaches a broad range of conduct. When acting in conjunction with the conspiracy statute, 18 U.S.C. § 371, it goes even further. An illustration of the FCPA's broad scope is provided by the recent conviction of Frederic Bourke in the Southern District of New York. Bourke was not charged with paying bribes, but instead was convicted of investing money in someone else's company with knowledge that the other person paid bribes to Azeri officials. Public reports since the trial reveal that the jury believed Bourke was not aware of the bribes until *after* he began investing, but it found that he should have gotten out of the investment. The Bourke conviction is on appeal.
- **The FCPA reaches foreign citizens in foreign places.** It is well known that the FCPA applies to U.S. companies and citizens, regardless where they are or where they bribe officials. But the Act also applies to foreign citizens if, among other things, they are employees or agents of U.S. companies. In November 2009, Fernando Basurto pleaded guilty in the Southern District of Texas to conspiring to violate the FCPA. Basurto is a Mexican citizen, lived and worked in Mexico City, and was a principal of a Mexican company. But because his company served as a sales representative for a Swiss company's U.S. subsidiary, Basurto was considered the agent of a "domestic concern" and thus was within the scope of the FCPA.
- **"Small" bribes are still bribes.** Recent events remind us that the FCPA has no *de minimus* threshold. Small bribes are still considered illegal bribes. On December 9, 2009, freight forwarder Panalpina announced that it is entering into settlement discussions with the DOJ concerning an ongoing investigation centered on its Nigerian operations. Through information discovered in other FCPA related prosecutions during the past three years, it is believed that Panalpina made payments to customs officials to move shipments through Nigerian customs.

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