Recent Enforcement Actions Under the US FCPA: Lessons to be Learned

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Topics

– Recent enforcement cases and some observations
– Refresher on the elements of the FCPA
– US legal developments that you need to know about
– What all of this means for you
Recent Enforcement Cases and Some Observations
Top 10 FCPA-Related Enforcement Actions Against Companies

1. Siemens (Germany, 2008): USD 800M
2. KBR/Halliburton (US, 2009): USD 579M
3. BAE (UK, 2010): USD 400M
5. Technip (France, 2010): USD 338M
6. JGC Corporation (Japan, 2011): USD 218.8M
7. Daimler (Germany, 2010): USD 185M
9. Panalpina (Switzerland, 2010): USD 81.8M
10. Johnson & Johnson (US, 2011): USD 70M
Some Observations

- 8 of the 10 are from 2010 and 2011
- 8 of the 10 are non-US companies
- Companies paid penalties to other governments
  - Siemens: USD 856M to German government, USD 46.5M to Nigerian government, USD 1.2M to Italian government
  - BAE: USD 49M to UK government
  - Halliburton: USD 35M to Nigerian government
  - Snamprogetti / ENI: USD 32.5M to Nigerian government
  - Technip: USD 30M to Nigerian government
  - JGC Corporation: USD 30M to Nigerian government
  - Alcatel-Lucent: USD 10M to Costa Rican government
  - Johnson & Johnson: USD 7.85M to UK government
Other Observations and Trends (1)

- US investigations take an industry focus
  - Oil and gas
  - Medical device and pharma
  - Telecommunications
  - On the horizon: financial services, aerospace, airlines
- Increased communication and cooperation among governments
- Some uncertainty about the ability for companies to coordinate “global” settlements
- Prosecution of individuals is still an enforcement priority
- Government expectations are higher when evaluating compliance programs, given the passage of time since the first large FCPA settlements (2001 and 2002)
Other Observations and Trends (2)

- Cases involve familiar situations
  - Use of third parties or other intermediaries
  - Improper payments to state-owned or -controlled commercial enterprises
  - Excessive hospitality
  - Commercial bribery
  - Issues discovered during M&A transactions
- Application of the FCPA to non-US companies
  - “Foreign private issuers” that trade shares in the US
  - “Agent” of an issuer
  - Aider and abettor
  - Territorial jurisdiction
Refresher on the Elements of the FCPA
High-level Comments About the FCPA

- Covers more than just bribes: anti-bribery and accounting standards/internal controls provisions
- Covers more than just US persons: issuer, nationality and territoriality jurisdiction
- Overlay with local law requirements: failure to comply with local law can be viewed as an indication of “corrupt” intent, but compliance with local law alone is not always enough to ensure compliance under the FCPA
- Not just a US legal concern: parallel anti-corruption legislation in many countries
Accounting and Internal Controls Provisions

“Issuers” are required to
- Make and keep detailed books, records, and accounts that fairly and accurately reflect transactions and dispositions of assets
- Devise and maintain internal accounting controls to ensure financial records and accounts are accurate for external reporting, that access to assets is permitted only in accordance with management instructions, and that books are audited at reasonable intervals
Anti-bribery Provisions

The FCPA generally prohibits issuers, U.S. persons or (under certain circumstances) non-U.S. persons from paying or giving, or offering or promising to pay or give any money or any other thing of value, “corruptly,” directly or indirectly to any foreign government official, foreign political party, or candidate for foreign political office for the purpose of influencing such recipients to do or omit to do certain acts or to secure any improper advantage, in order to obtain or retain business or direct business to any person.
Anything of Value

– Very broadly defined
  – Gifts
  – Entertainment, meals, travel expenses
  – Discounts on products or services
  – Incentive payments
  – Employment, consultancies
  – Shares in a company
  – Benefits extended to family members of foreign officials
“Corruptly”

– Evil motive or purpose, an intent to wrongfully influence the recipient
– Violation of local law
– Is following local custom an excuse?
Prohibited Foreign Recipients

- “Foreign officials” (see next slide)
- Foreign political parties
- Candidates for foreign political office
- Officials of public international organizations, such as the World Bank, the WHO, UNICEF
- Any third party while “knowing” that some or all of the payment will be paid to any of the above
“Foreign Officials”

- Employees of a foreign ministry or other government agency
- Employees of a government instrumentality, i.e., entity owned or controlled by a foreign government, such as a state-run oil company, telecommunications company, public hospital, etc.
- Local law treatment is relevant but not conclusive under the FCPA
“Knowing”

– Actual knowledge
– Conscious disregard
– “Head in the sand”
– Disavowal of responsibility when certain facts are apparent
– Duty to investigate and resolve “red flags”
Proscribed Purposes

– To obtain or retain business (e.g., product sales, product approvals, favorable pricing control decisions)
– To direct business to any person or firm
– To obtain any other unfair advantage, e.g.,
  – Tax reduction, exemption or benefit
  – Reclassification or under-valuation for customs purposes
  – Issuance of a license or permit
  – Waiver of penalties for non-compliance with law
Permissible Payments

- "Facilitating payments"
  - Gratuities given to government officials for performing “routine” actions that do not involve the exercise of discretion
- Reasonable and bona fide expenditures directly related to
  - The promotion of products or services or
  - The performance of a contract with a foreign government or agency

These are typically tricky gray areas to navigate; clear and detailed company policy and procedures can provide employees with guidance
Penalties and Consequences

- Civil and criminal fines of up to $2 million or twice the gross gain to the organization
- Imprisonment and fines for individuals
- Forfeiture of assets, including disgorgement in certain cases
- Collateral penalties
  - Debarment from government contracting
  - Loss of export privileges
FCPA Risk Areas

- Third-party relationships (agents, consultants, distributors, other parties acting on company’s behalf)
- Business dealings/relationships with foreign officials
  - Gifts, hospitality and entertainment
  - Sponsorship at trade association or professional organization conferences
  - Service relationships in certain industries (e.g., public healthcare physician providing research services to company, conducting clinical trials)
- Marketing and promotional practices
- Charitable donations
- Joint ventures
- M&A transactions
  - Successor liability
  - Newly created liability, through transaction
US Legal Developments and What They Mean for You
US Legal Developments and What They Mean for You (1)

- Dodd-Frank whistleblower provisions
  - This could influence voluntary disclosure considerations
  - Companies should be scrutinizing their internal reporting and response mechanisms
- Fewer “independent compliance monitors” or “independent compliance consultants” are being appointed
  - Companies are instead subject to self-assessment and self-reporting requirements
  - Increased incentive for companies to establish and maintain robust compliance programs, since the appointment of monitors appears to be reserved for companies that lack such programs and the associated compliance culture
- Civil litigation related to FCPA matters is becoming more routine
  - Shareholder lawsuits, wrongful termination lawsuits by employees, lawsuits brought by government customers
  - Should be taken into consideration for FCPA investigation protocols and settlements
  - Companies are increasingly including compliance updates and monitoring as regular agenda items for board and management meetings
US Legal Developments and What They Mean for You (2)

- US government uses the FCPA accounting provisions to charge activities that are not reached by the FCPA antibribery provisions, such as
  - Bribery of foreign officials that may lack a US nexus
  - Commercial bribery
- Recent judicial challenges to two key FCPA elements:
  - What constitutes a “foreign official” when state-owned/controlled commercial enterprises are involved?
  - How much of a connection to the US is required to establish “territorial jurisdiction”?
Questions?