

Global Compliance Readiness – Law Firms

Employing Proactive Investigative Techniques To Facilitate A Global Culture Of Integrity And Avoid FCPA Violations

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The U.S. Department of Justice (“DOJ”) and Securities and Exchange Commission (“SEC”) have prioritized enforcing the Foreign Corrupt Practices Act (“FCPA”), as evidenced by the numerous high-profile cases resolved in late 2006 through the present. This should serve as a wake-up call to all global corporations. To avoid the huge financial and reputational cost of FCPA prosecutions, corporations should conduct a proactive review of worldwide operations to identify and eliminate opportunities for fraud and abuse and to devise and enforce a uniform culture of integrity. General counsel should hire outside counsel experienced in complex criminal investigations to conduct the review in order to ensure its independence and credibility.

The Broad Scope Of The FCPA

The anti-bribery provisions of the FCPA prohibit issuers, domestic concerns and foreign persons acting within the United States from: corruptly using the mails or any means or instrumentality of interstate commerce in furtherance of a payment, agreement to pay or offer to pay money or anything of value to any foreign official, foreign political party, political party official, candidate for political office or any known conduit for the purpose of influencing any act or decision of such foreign official in his official capacity, inducing any act or omission to act by such person in violation of his awful duty or securing an improper advantage to assist in obtaining or retaining business.¹

There are three categories of potential bribe-givers. An issuer is any company with a class of securities subject to registration and reporting requirements of the SEC.² A domestic concern is any business entity that has its principal place of business in the United States or is organized under the law of a state or territory.³ Directors, officers, employees and agents of issuers and domestic concerns also fall within the statutory ambit.⁴ Moreover, the FCPA covers persons regardless of nationality and foreign corporations, even if they are not subject to registration and record-keeping requirements, for acts within the United States.⁵

The object of the bribe - *i.e.*, the foreign official - is also broadly defined to include any officer or employee of a foreign government, department, agency or instrumentality thereof.⁶

In addition, the FCPA requires issuers to maintain books and records that “accurately and fairly reflect the transactions and dispositions of the assets of the issuer” and to have in place internal controls that provide reasonable assurance that management is authorizing transactions and that transactions are sufficiently recorded to permit preparation of financial statements in accordance with generally accepted accounting principals.⁷

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The White-Hot Enforcement Environment

DOJ and the SEC have recently enforced the FCPA with a previously unseen zeal. A few examples of recent high-profile cases follow.

Schnitzer Steel

On October 16, 2006, Schnitzer Steel Industries, Inc. and a subsidiary referred to as SSI Korea resolved FCPA cases with DOJ and the SEC. SSI Korea pled guilty to conspiring to violate the FCPA, substantively violating the FCPA, wire fraud and aiding and abetting a books and records violation by its parent. Schnitzer Steel entered into a deferred prosecution agreement with respect to the same conduct.⁸

In essence, corrupt payments of approximately \$204,537 were paid to managers of government-owned customers in China; and corrupt payments of approximately \$1,683,672 were paid to managers of private customers in China and South Korea to induce them to purchase, and to secure an improper advantage with respect to the purchase of, scrap metal from Schnitzer Steel.⁹ Other notable facts include that, during most of the time corrupt payments were being made, Schnitzer Steel did not train its employees regarding the FCPA or monitor their FCPA compliance.¹⁰ Additionally, after the misconduct was discovered and prohibited, authorization was given for two more corrupt payments and for an increase in entertainment expenses in lieu of cash payments.¹¹

By investigating, voluntarily disclosing, cooperating, taking remedial actions and agreeing to engage a compliance monitor, Schnitzer Steel obtained a disposition including imposition of a \$7.5 million criminal fine on SSI Korea and disgorgement of \$7.7 million in profit and pre-judgment interest in a related SEC action.¹²

Vetco Gray

On February 6, 2007, three Vetco International Ltd. subsidiaries – Vetco Gray Controls Inc., Vetco Gray UK Ltd. and Vetco Gray Controls Ltd. – pled guilty to FCPA charges.¹³

Vetco Gray UK Ltd. provided engineering and procurement services and sub-sea construction equipment for Nigeria’s first deepwater oil drilling project; and the other two subsidiaries supplied Vetco Gray UK Ltd. with employees and manufacturing equipment for the project. The three subsidiaries engaged an international freight forwarding and customs clearing company, which they authorized “to make at least 378 corrupt payments totaling approximately \$2.1 million to Nigerian Customs Service officials to induce those officials to provide [the subsidiaries] with preferential treatment during the customs process.”¹⁴ This conduct followed a prior FCPA guilty plea by Vetco Gray UK Ltd. and a DOJ-issued FCPA opinion requiring a compliance program, internal controls, training and other procedures to detect and deter FCPA violations.¹⁵

Voluntary disclosure, cooperation, remedial steps and a commitment to undertaking an investigation and “hir[ing] an independent monitor to oversee the creation and maintenance of a robust compliance program” were taken into account by DOJ in reaching a resolution that included criminal fines of \$6 million for Vetco Gray Controls



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Inc., \$8 million for Vetco Gray Controls Ltd. and \$12 million for Vetco Gray UK Ltd., for a then-record \$26 million FCPA penalty.¹⁷

Baker Hughes

On April 26, 2007, a subsidiary of Baker Hughes Incorporated – Baker Hughes Services International, Inc. (“BHSI”) – pled guilty to conspiring to violate the FCPA, substantively violating the FCPA and aiding and abetting a books and records violation by its parent. Baker Hughes Incorporated entered a deferred prosecution agreement in connection with the same conduct.¹⁸

The government of Kazakhstan and a state-owned company, KazakhOil, entered into an agreement with a consortium of international oil companies to develop and operate an oil field referred to as the Karachaganak project. BHSI submitted a bid to perform project management, oil drilling and other services for the project. Before it was officially announced that BHSI had submitted the winning bid, KazakhOil officials demanded payment of a commission to a consulting firm. BHSI agreed, paying “approximately \$4.1 million in bribes over approximately a two-year period to an intermediary whom the company understood and believed would transfer all or part of the corrupt payments to an official of KazakhOil...”¹⁹

Baker Hughes’ “extensive and thorough internal investigation of its operations in Kazakhstan and throughout its high-risk global operations;” its voluntary disclosure of the matter and significant remedial steps and control enhancements paved the way for resolution of the case.²⁰ The resolution included BHSI agreeing to pay a criminal fine of \$11 million and to adopt a comprehensive anti-bribery compliance program, overseen by a monitor to be hired by Baker Hughes, and Baker Hughes agreeing to pay \$10 million in civil penalties for violating a 2001 cease and desist order prohibiting books and records and internal controls violations as well as more than \$23 million in disgorgement of profits and pre-judgment interest from the Karachaganak project in a related SEC action.²¹

How To Avoid FCPA Problems

The best way to avoid FCPA problems is to undertake a top to bottom review of a global corporation’s worldwide operations whether or not a problem has been identified. Ideally, this proactive review is not initiated by a subpoena, a whistleblower’s call or an identification by some other means of a vulnerability or a full blown problem, although those warnings must be heeded. Instead, it is initiated by the company because it wishes to avoid the dramatically increasing cost of FCPA violations and be a good corporate citizen.

Preferably, the review will be conducted by outside counsel with experience investigating and prosecuting complex criminal cases in order to ensure a clear-eyed independence that will stand the company in good stead with the government if an FCPA problem nonetheless materializes. Forensic consultants should be used as necessary.

The review involves counsel becoming totally immersed in the corporation’s worldwide business by reviewing publicly available as well as internal corporate documents in order to fully understand the industry in which the corporation operates, the corporation’s place in the industry, the corporate structure, the management and employees, the nitty gritty of what those employees do and how they do it, including third parties that they deal with, and the locales in which

this work is done so that counsel can identify opportunities for fraud and abuse.

The review additionally involves ascertaining of whether policies, procedures and controls with respect to the FCPA exist and apply across the board to the company and its subsidiaries. If such policies, procedures and controls exist, are they well-designed to prevent violation of the FCPA? Are they free of loopholes? Are they unvarying from one locale to another? Zero tolerance for violations of the FCPA regardless of local practice must be the consistently stated policy of the corporation and its subsidiaries.

Employee interviews are an essential part of the review both to develop a complete understanding of how employees conduct business in specific locales and to flesh out whether FCPA policies and procedures have been distributed, training has been provided, consultation is available and, fundamentally, whether the policies and procedures are followed in practice. Carefully considered third party interviews may also be valuable in this regard.

The advantages of conducting at least part of the review on-site cannot be overestimated. Observation of the daily, practical challenges employees face and how they respond will provide an unvarnished view on FCPA compliance. And the opportunity for casual face-to-face interaction may prompt employees to confide in counsel, providing the surest way to identify loopholes and deviations from FCPA policies and procedures.

The review should also involve devising or refining the anti-bribery compliance program with reference to the clear preferences of DOJ as reflected in the U.S. Sentencing Guidelines.²² Being in conformity with these guidelines before there is a problem will best enable the company to be FCPA compliant and to be well-positioned with DOJ and the SEC if a problem nonetheless develops.

Conclusion

A few things are clear: the FCPA has broad scope, prominent global companies have been prosecuted with increasing regularity resulting in hefty fines, and intensive investigation and commitment to compliance programs after the fact have seemingly helped companies avoid harsher consequences. A practical, cost-effective approach is to have experienced outside counsel conduct such an investigation in order to avoid the problem rather than play catch up.

¹ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) and 78dd-3(a).

² 15 U.S.C. § 78dd-1(a).

³ 15 U.S.C. § 78dd-2(h)(1)(A).

⁴ 15 U.S.C. §§ 78dd-1(a) and 78dd-2(h)(1)(B).

⁵ 15 U.S.C. § 78dd-3(f)(1).

⁶ 15 U.S.C. § 7878dd-1(f)(1); 78dd-2(h)(2) and 78dd-3(f)(2)(A).

⁷ 15 U.S.C. § 78m(b)(2)(A).

⁸ 15 U.S.C. § 78m(b)(2)(B).

⁹ See DOJ Release, June 29, 2007; Form 8-K, October 19, 2006.

¹⁰ Schnitzer Steel DPA, Statement of Facts ¶ 4.

¹¹ Id. at ¶ 35.

¹² Id. at ¶ 36.

¹³ Id. at ¶¶ 41 and 42; DOJ Release, June 29, 2007; Form 8K October 19, 2006.

¹⁴ DOJ Release, February 6, 2007.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

¹⁸ DOJ Release, April 26, 2007.

¹⁹ Id.

²⁰ Id.

²¹ Id.; SEC Litigation Release No. 20094, April 26, 2007.

²² U.S.S.G. § 8B2.1.