

MAYER • BROWN

Foreign Corrupt Practices Act

Status Report on 2009 Enforcement Activity

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Outline of Today's Discussion

- Overview of the Foreign Corrupt Practices Act
- Review of enforcement activity (through November 10, 2009)
 - Individuals
 - Corporations
- Enforcement and litigation trends
- Emerging best practices

Overview: What is the FCPA?

- The FCPA prohibits bribery of foreign officials
 - The FCPA prohibits offering, promising, authorizing or paying money or anything of value to a foreign official, political party, or party official with the intent to influence that official in his official capacity or to secure an improper advantage in order to retain or obtain business
- The FCPA requires sound accounting
 - The FCPA also requires publicly traded companies, whether based in the US or outside the US, to maintain accurate books and records, and to design and maintain reasonable internal accounting controls

Overview: Who Is Covered?

- The anti-bribery provisions of the FCPA apply to three categories of individuals and entities
 - **Issuers:** any company that is registered or required to file periodic reports with the SEC, including any officer, director, employees, or agents of these companies
 - **Domestic Concerns**
 - Any individual who is a US citizen, nation, or resident
 - Any business organization that has its principal place of business in the US or which is organized in the US
 - **Any Person:** who acts in furtherance of a corrupt payment while within the territory of the US, and uses the means or instrumentalities of interstate commerce

Review of Enforcement Activity

- “Over the past two years, the US government has collected almost a billion and a half dollars in fines in foreign bribery cases” (Mark Mendelsohn)
- At least 120 companies are the subject of ongoing FCPA investigations
- Sector-wide investigations
 - Health care
 - Oil and gas

Review of Enforcement Activity

ACTIONS AGAINST INDIVIDUALS

Review of Enforcement Activity: Individuals

The Year of the Individual

- Summary of 2009 individual enforcement actions
 - Convictions: 4
 - Sentences: 2
 - Indictments: 8
 - Arrests: 2
 - Guilty pleas: 6
 - SEC Settlements: 4

Review of Enforcement Activity: Individuals (cont'd)

Convictions and Sentences

- FCPA trials lead to guilty verdicts: There has not been an acquittal in an FCPA prosecution since 1991
- Convictions
 - Frederic Bourke: Convicted in July 2009 of conspiracy to violate the FCPA and making false statements to authorities
 - William Jefferson: US Representative convicted in August 2009 of participating in a conspiracy to violate the FCPA, various counts of domestic bribery, racketeering and money laundering
 - Gerald and Patricia Green: Beverly Hills husband and wife producing team, convicted of conspiracy and substantive FCPA violations and money laundering violations

Review of Enforcement Activity: Individuals (cont'd)

Convictions and Sentences

- Sentences

- ShuQuan-Sheng: 51 months
- Frederic Bourke: 1 year, \$1 million fine
- As of October 2009, 16 people are awaiting sentencing in connection with FCPA cases

Review of Enforcement Activity: Individuals (cont'd)

Bourke Trial and Conviction

- Background: Federal jury found that Bourke invested in Czech-born promoter Viktor Kozeny's unsuccessful attempt in 1998 to gain control of Azerbaijan's state oil company, Socar, despite knowing Kozeny planned to bribe Azeri leaders
- Defense: Denial of actual knowledge. Judge gave jury instruction using FCPA expansive definition of knowledge.
- Jury Foreman: "It was Kozeny, it was Azerbaijan, it was a foreign country. We thought he knew [about the bribery] and definitely could have known. He's an investor. It's his job to know."

Review of Enforcement Activity: Individuals (cont'd) Jefferson Trial and Conviction

- First elected US official to be charged under the Foreign Corrupt Practices Act
- Allegations: Indictment alleged among other things that he conspired to bribe the then Nigerian vice president, AtikuAbubakar, and later paid or promised to pay him bribes to steer telecommunications contracts to companies controlled by Jefferson's family

Review of Enforcement Activity: Individuals (cont'd)

Green Trial and Conviction

- Gerald Green, a film producer, and his wife Patricia Green were accused of multiple counts of violating federal laws in connection with making payments to Thai officials in exchange for winning contracts to run the Bangkok Film Festival
- Payments allegedly amounted to \$1.8 million, and the contracts were worth at least \$14 million
- Evidence showed that the Greens disguised bribes as "sales commission" payments, and made the payments for the benefit of the former governor through the foreign bank accounts of intermediaries

Review of Enforcement Activity: Individuals (cont'd) Indictments and Arrest

- Eight individuals indicted so far in 2009
- Executives of Control Components, Inc.
 - Biggest multi-party indictment to date
 - Allegations: From 2003 to 2007, the executives caused CCI to make at least 236 corrupt payments in more than 30 countries
 - Titles of executives (former positions)
 - CEO
 - Director of sales for China and Taiwan
 - Director of worldwide sales
 - V.P. of worldwide customer services
 - V.P. of sales for Europe, Africa and the Middle East
 - President of Korea office

Review of Enforcement Activity: Individuals (cont'd)

Indictments and Arrest

- Former employee and agent of Kellogg, Brown and Root
 - Both UK citizens
 - US seeking extradition for both
- Arrests
 - UK citizen arrested in UK; US seeking extradition
 - Canadian citizen arrested in Germany; US seeking extradition

Review of Enforcement Activity: Individuals (cont'd)

Guilty Plea

- 6 individuals have plead guilty
 - Two former executives of Control Components, Inc.
 - Two Miami-based businessmen related to telecommunications contracts in Haiti
 - Former director of sales and marketing for Pacific Consolidated Industries
 - Partner of Nexus Technologies

Review of Enforcement Activity: Individuals (cont'd)

SEC Settlements

- Four individuals have settled enforcement actions with the SEC so far this year
- Nature's Sunshine Products, Inc.
 - Former Chief Executive Officer and former Chief Financial Officer
 - In their capacity as "control persons" were each fined \$25,000 for violations including of the FCPA books and records provisions
- Faro Technologies – former sales director
- Former president of ACL Technologies (sub of UIC)

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Review of Enforcement Activity

ACTIONS AGAINST COMPANIES

Review of Enforcement Activity: Corporations Status Report on 2009 Enforcement

- Summary of 2009 corporate enforcement activity
 - Criminal/DOJ Resolutions: 6
 - Civil Enforcement/SEC Resolutions: 8

Review of Enforcement Activity: Corporations Summary – DOJ Resolutions

- Criminal / DOJ resolutions: 6
 - AGCO Corp.
 - Control Components, Inc.
 - Helmerich & Payne, Inc.
 - Kellogg, Brown and Root LLC
 - Latin Node, Inc.
 - Novo Nordisk A/S

Review of Enforcement Activity: Corporations Summary – SEC Resolutions

- Civil enforcement / SEC resolutions: 8
 - AGCO Corp.
 - Avery Dennison Corp.
 - Halliburton Co. / Kellogg, Brown and Root Inc.
 - Helmerich & Payne, Inc.
 - ITT Corp.
 - Nature’s Sunshine Products Inc.
 - Novo Nordisk A/S
 - United Industrial Corp.

Review of Enforcement Activity (cont'd)

Corporate FCPA Settlements – Siemens Review

The Siemens Enforcement Action & Guilty Pleas

- December 2008: Siemens AG, a German corporation and three of its subsidiaries, plead guilty to violations of the FCPA. The company and subsidiaries agree to pay a criminal fine to DOJ and disgorgement of profits to the SEC
- Coordinated global investigation by regulatory authorities in more than 10 countries and spanned 2 years to finish
- Penalties / Costs
 - \$1.6 billion combined fines, paid to German and US authorities and disgorgement of profits
 - Independent compliance monitor for 4 years
 - Ongoing investigations of employees and agents
 - Total cost of investigation: \$850 million

Review of Enforcement Activity (cont'd)

Corporate FCPA Settlements – Haliburton/KBR

- February 2009: Kellogg, Brown & Root LLC pleaded guilty to criminal violations of the FCPA and KBR, Inc., its former and current parent companies, respectively, settled related civil FCPA charges
- Between 1995 and 2004, company joint venture paid nearly \$182 million in consulting fees to two agents knowing that some of the fees would be passed along to Nigerian officials. Payments lead to the award of \$6 billion in contracts and \$235.5 million profits to a company joint venture
- Penalties: \$579 million combined fines and disgorgement of profits; independent compliance monitor for three years

Review of Enforcement Activity (cont'd)

Corporate FCPA Settlements – Haliburton/KBR

- Individual Actions: In September 2008, former KBR Chairman and CEO pled guilty to conspiracy to violate the FCPA and conspiracy to commit mail and wire fraud. Sentenced to 7 years in prison and \$10.8 million in restitution
- Indictment: After settlement with companies, DOJ unsealed indictment against two British citizens for their alleged roles in the bribery scheme
- Collateral consequences
 - UK Investigation: October 2009, Halliburton disclosed in a regulatory filing that the UK Serious Fraud Office is looking into civil or criminal charges against M.K. Kellogg, a KBR joint venture in the UK
 - Additional Investigations: Company further disclosed that France, Nigeria and Switzerland are also investigating the matter

Review of Enforcement Activity (cont'd)

Corporate FCPA Settlements – Latin Node, Inc.

- April 2009, Latin Node, Inc. pleaded guilty to criminal FCPA violations filed in connection with unlawful payments made to government officials in Honduras and Yemen in return for the award of new telecommunications contracts and favorable contract terms. Payments totaled approximately \$2.2 million.
- eLandia, International, Inc. a public telecommunications provider acquired the company in June 2007, discovered the bribes in post-acquisition integration and voluntarily disclosed the payments to DOJ and the SEC
- DOJ sentencing memo: Payments took place before acquisition; implies little or no pre-acquisition due diligence

Review of Enforcement Activity (cont'd)

Corporate FCPA Settlements – United Industrial Corp

- May 2009: United Industrial Corp., aerospace and defense systems contractor, settled an administrative proceeding brought by the SEC for violation of the FCPA's bribery and books and records provisions
- Allegations: SEC claimed that a United subsidiary made more than \$100,000 in payments to an agent with the expectation the agent would pass portion of the payments to foreign officials in the Egyptian Air Force
- Alleged the payments to the agent under "circumstances that strongly indicated [that the funds] would be used to make illicit payments" to EAFofficials
- Penalties: \$337,679 disgorgement / prejudgment interest

Review of Enforcement Activity (cont'd)

Corporate FCPA Settlements – United Industrial Corp

- United's failures
 - Lacked meaningful controls to prevent or detect former president's authorization of illicit payments to the agent
 - United's legal department approved the retention of the agent despite a lack of documented due diligence and other violations of United's company policy
 - A United official directly approved at least one payment to the agent
 - The illicit payments to the agent were allegedly mischaracterized on United's books and records as legitimate expenses

Review of Enforcement Activity (cont'd)

Corporate FCPA Settlements – Control Components

- July 2009 guilty plea for FCPA and Travel Act violations
- Bribe payments to officials at state-owned enterprises in
 - China
 - Malaysia
 - Korea
 - UAE
- Penalties
 - \$18.2 million fine
 - Compliance monitor
 - Probation

Review of Enforcement Activity (cont'd)

Corporate FCPA Settlements – Novo Nordisk A/S

- May 2009: Novo Nordisk A/S , a Danish pharmaceutical company, settled wire fraud and FCPA accounting charges with the DOJ and SEC related to kickback payments made to the government of Iraq during its participation in the U.N. Oil for Food program
- Novo settled criminal charges of conspiracy to commit wire fraud and to violate the books and records provisions of the FCPA by agreeing to pay a \$9 million criminal penalty as part of a DOJ deferred prosecution agreement
- Novo settled SEC complaint paying a civil penalty of \$3,025,066 and to disgorge \$6,005,079 in profits

Review of Enforcement Activity (cont'd)

Corporate FCPA Settlements – Novo Nordisk A/S

- Novo had ADRs publicly traded on the New York Stock Exchange, thus qualifying Novo as an “issuer” for purposes of the FCPA
- \$1.4 million in kickback payments were made through a foreign agent who acted as an agent and distributor
- Payments were concealed through inflation of commission payments to agent
- Payments were recorded as legitimate commission payments

Review of Enforcement Activity (cont'd)

Corporate FCPA Settlements –

- Nature's Sunshine Products, Inc.
 - July 2009: SEC settled an enforcement action against the Nature's Sunshine, and the company's CEO and CFO
 - Charges related to bribes paid by NSP's Brazilian subsidiary to customs officials, to import unregistered products into Brazil. Payments were made in cash to the customs officials via customs brokers.
 - Payments were not accurately recorded in NSP's books and records. Company also purchased false supporting documents to conceal the nature of the payments
 - Company paid \$600,000 for various violations including the anti bribery provision and books and records provisions of the FCPA

Review of Enforcement Activity (cont'd)

Corporate FCPA Settlements – Helmerich & Payne, Inc.

- July 2009: DOJ non prosecution and SEC settlement
- H &P Venezuela allegedly paid customs officials, through customs brokers, \$19,637 to import and export equipment and materials not in compliance with Venezuelan regulations or to secure a partial inspection, rather than a full inspection of imported goods
- H&P Argentina made payments totaling \$166,000 through customs brokers to customs officials allowing H&P to avoid \$186,000 in expenses. Payments were to permit and expedite the importation and exportation of equipment and materials without required certifications and to allow the importation of materials that could not be imported under Argentine law.

Review of Enforcement Activity (cont'd)

Corporate FCPA Settlements – Helmerich & Payne, Inc.

- Penalties

- DOJ, \$1 million fine
- SEC, \$375,681.22 in disgorgement and prejudgment interest

- Lessons learned

- *FCPA compliance training is important.* The allegations were first disclosed by an employee following FCPA training. The company commenced an investigation.
- *Importation and exportation is a high risk activity.* As demonstrated in the Nature's Sunshine case and others, the use of customs brokers and the exportation and importation of goods can be a high risk activity.
- *Attention should be paid to vague and incomplete descriptions of costs.* H&P books set forth misleading terms such as “extraordinary costs,” “extra costs” and “urgent processing”

Enforcement and Litigation Trends

- Jury instruction in Bourke trial re: knowledge
- Control person liability
- Ancillary litigation related to FCPA matters
 - US civil litigation
 - Investigations in other countries
- DOJ opinion release re: donations to governments

Enforcement and Litigation Trends (cont'd)

Knowledge Instruction from Bourke Trial

- Knowledge does include willful ignorance
 - “When knowledge of the existence of a particular fact is an element of the offense, such knowledge may be established if a person is aware of a **high probability** of its existence and **consciously and intentionally avoided confirming that fact**. Knowledge may be proven in this manner, if, but only if, the person suspects the fact, realized its high probability, but refrained from obtaining the final confirmation because he wanted to be able to deny knowledge.”
 - Lesson of Bourke: When operating in countries or industries where corruption “red flags” exist conduct due diligence to identify risks

Enforcement and Litigation Trends (cont'd)

Control Person Liability (Nature's Sunshine)

- Nature's Sunshine complaint
 - Alleged that, as “control persons,” the CEO and CFO violated the FCPA's books and records and internal control provisions
 - SEC alleged that the executives held “supervisory responsibilities” over NSP's senior management and policies, yet as “control persons,” “failed to make and keep books, records, and accounts, which in reasonable detail, accurately and fairly reflected the transactions of NSP”
- Control person theory of liability extends FCPA liability
- No need to prove that a controlling person had knowledge or involvement of the wrongdoing

Enforcement and Litigation Trends (cont'd)

Ancillary Litigation

- Latin Node / eLandia
 - Purchaser acting against seller for false representation in sale documentation re: FCPA compliance
- Halliburton / KBR
 - Shareholder derivative action seeks to hold Defendants responsible for “the reign of terror their reckless failure to monitor the Companies’ internal controls permitted to take place at the Companies”
 - Recent announcement that UK SFO is also investigating
- Siemens
 - \$100 million World Bank settlement

Enforcement and Litigation Trends (cont'd)

DOJ Opinion Release re Medical Device Free Samples

- FCPA Opinion Procedure: Allows issuers and domestic concerns to get the Attorney General's opinion on whether prospective conduct conforms with DOJ's present FCPA enforcement policy
- August 2009: DOJ issued its first and only opinion release this year
- DOJ agreed not to take enforcement action against a medical device manufacturer who proposed to provide \$1.9 million in medical devices to government health centers in a foreign country. DOJ noted the conduct fell outside of the FCPA because products were provided to the government rather than individual government officials.

FCPA Compliance: Emerging Best Practices

- Adopt standalone FCPA policies and procedures
- Monitor compliance implementation
- Senior executives in the cross-hairs
- Extraterritorial application of FCPA
- Customs issues – high risk activity
 - Nature's Sunshine
 - Helmerich & Payne

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