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FCPA and the UK Bribery Act

Status Report on FCPA Enforcement for the First Half of 2010 and the UK Bribery Act 2010

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Outline of Today's Discussion

- General overview
- Overview of the Foreign Corrupt Practices Act
- Overview of the UK Bribery Act
- FCPA enforcement trends
- Review of FCPA enforcement activity (through July 1, 2010)
 - Individuals
 - Corporations
- How the UK Bribery Act might impact your business
- Compliance and prevention best practices

OVERVIEW OF THE FCPA

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

OVERVIEW OF THE UK BRIBERY ACT

Overview of the UK Bribery Act 2010

- Received Royal Assent on 8 April 2010 – will abolish all existing UK anti-bribery laws that is not yet operative – may not come into force late 2010/early 2011
- It is not retrospective, so existing anti-bribery laws are still relevant
- It makes it an offence for both an individual and a commercial organisation:
 - to give or receive a bribe
 - to offer, promise, request or agree to receive a bribe
 - to bribe a foreign public official
- If a commercial organisation has committed one of the bribery offences referred to above, then “Senior Officers” who have “consented or connived” in the commission of the offence are also liable
- The Act introduces a wholly new corporate offence – if a commercial organisation fails to prevent bribery by its representatives acting in the course of its business
- The Act applies to public and private sector bribery, both UK domestic and foreign

ENFORCEMENT TRENDS

FCPA Enforcement and Litigation Trends

- Government regulators will continue to aggressively bring cases against both corporations and individuals. The government is focused on both the executives who authorize the bribes as well as the foreign government officials who accepts the bribe.
- Specific industries such as oil and gas, pharmaceuticals and telecommunications are of particular focus to regulators.
- There will be increased cooperation between the U.S. and other nations in the enforcement of anti-corruption laws.
- The government will expect companies to refine and enhance their ethics and compliance programs to conform to best practices and the lessons learned from other enforcement actions.
- Government regulators expect that companies operating outside the U.S. will conduct due diligence when retaining third parties to act for them or when forming joint ventures or mergers.
- The government will reward those companies who voluntarily disclose FCPA issues.

REVIEW OF ENFORCEMENT ACTIVITY

Review of Enforcement Activity

- “Since 2004, the Fraud Section has achieved 37 corporate FCPA and foreign bribery related resolutions, with fines totaling over \$1.5 billion. In this time period, we have charged 81 individuals with FCPA violations and related offenses. Forty-six have been charged since the start of 2009 – more than the total number of individuals charged in the previous seven years combined.”
 - **Remarks of Lanny A. Breuer, Assistant Attorney General, Criminal Division (May 26, 2010)**
- As of January 19, 2010, approximately 140 companies and/or individuals were under investigation for potential FCPA violations
 - **Remarks of Lanny A. Breuer (Jan. 19, 2010)**

Review of Enforcement Activity

- The first Quarter of 2010 was the **busiest ever** for FCPA-related enforcement
 - 22 Individuals charged in the “Shot Show” enforcement action
 - Guilty pleas from a number of individuals, BAE Systems, Innospec
 - Daimler AG charged
- Q2 2010 was **quieter**
 - Only three new enforcement actions from the SEC and one from DOJ

Review of Enforcement Activity – The FCPA Remains a Top Enforcement Priority

- “The Department places a significant and high priority on its FCPA program. You can see that commitment in the prosecutions we’re bringing and the resources we’ve dedicated to enforcement.”
 - *Mark Mendelsohn, Deputy Chief, Fraud Section, Criminal Division, DOJ (Mar. 23, 2010)*
- U.S. Attorney General Eric Holder has identified the FCPA as a **top priority** of the Obama administration
140 active investigations at DOJ,
 - *Lanny Breuer, Assistant Attorney General (May 2010)*
- New enforcement resources include:
 - New SEC Unit Dedicated to FCPA Enforcement
 - Increased cooperation with the FBI, including a new Dedicated FCPA Unit in the FBI’s Washington Field Office

Review of Enforcement Activity

- Actions against individuals

Review of Enforcement Activity: Trend of Prosecuting Individuals Continues

- Summary of Q1-Q2 2010 individual enforcement actions
 - Sentences: 5
 - Indictments: 22
 - Guilty pleas: 9
 - SEC Settlements: 6

Review of Enforcement Activity: Trend of Prosecuting Individuals Continues

“Charging individuals is part of a *deliberate* enforcement strategy to deter and prevent corrupt corporate conduct before it happens. And rest assured that we will seek equally tough sentences, including significant jail time if appropriate, to reinforce this message of deterrence.”

- Lanny A. Breuer (May 26, 2010)

“The [Shot Show investigation] is the largest single prosecution of individuals in the history of DOJ’s enforcement of the FCPA. It thus vividly illustrates one cornerstone of our FCPA enforcement policy: the aggressive prosecution of individuals. Put simply, the prospect of significant prison sentences for individuals should make clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations. As we focus on the prosecution of individuals, we will not shy away from tough prosecutions, and we will not shy away from trials. We are ready, willing, and able to try FCPA cases in any district in the country—as we demonstrated with our three FCPA trial victories just last year.”

- Lanny A. Breuer (Feb. 25, 2010)

Review of Enforcement Activity: Gun Show Indictments

- The Shot Show arrests and indictments “vividly illustrates” the Government’s focus on individual deterrence, said Breuer
- On January 18, 2010, 21 people were arrested a Las Vegas gun show (and another in Miami) as a result of an undercover FBI operation focused on allegations of foreign bribery in the military and law enforcement products industry
- Largest single investigation and prosecution against individuals in the history of DOJ’s enforcement of the FCPA
- **First large-scale use of undercover law enforcement techniques to uncover FCPA violations**
- The indictments alleged that the defendants engaged in a scheme to pay bribes to the minister of defense for a country in Africa. In fact, the scheme was part of the undercover operation, with no actual involvement from any minister of defense

Review of Enforcement Activity: Sample of Guilty Pleas and Sentences

- **Jim Bob Brown** (January 28) former **Willbros** employee, was sentenced to **12 months** in prison and fined **\$17,500** for conspiracy to violate the FCPA. Brown admitted bribing Nigerian officials in order for favorable treatment in pending court cases in and lower taxes and admitted bribing officials in Ecuador in exchange for contracts. His co-defendant, **Jason Edward Steph** was sentenced to **15 months** and fined **\$2,000**.
- **John W. Warwick** (February 10) pleaded guilty to conspiracy for his role in paying bribes to former Panamanian government officials to secure maritime contracts. Warwick received **37 months** in prison, two years of supervised release following his prison term, and forfeited **\$331,000** in proceeds of the crime.
- **Charles Paul Edward Jumet** (April 19), Warwick's co-defendant, was sentenced to **87 months** in prison and fined **\$15,000**. *Prosecutors said it's the longest sentence ever in an FCPA-related case,* likely because Jumet was charged with lying to federal investigators.
- **Robert Antoine** (June 2) of Miami and Haiti, a former employee of Haiti's state-owned national telecommunications company, was sentenced to **48 months** for being part of a bribery and money-laundering scheme. He was also ordered to pay \$1,852,209 in restitution and to forfeit \$1,580,771, and serve three years of supervised release.

Review of Enforcement Activity: SEC Matter, Dimon Inc.

- On April 29, the SEC announced that it brought a civil enforcement action against four former employees of North Carolina based tobacco company, Dimon, Inc., now Alliance One International, Inc.
- The SEC charged the former executives with violating the anti-bribery provisions of the FCPA and aiding and abetting violations by paying more than \$3M in bribes to government officials in Kyrgyzstan in order to purchase tobacco and avoid tax audits; and more than \$500,000 to officials in Thailand for cash and travel in order to obtain \$9.4 million in contracts
- The defendants agreed to settle the charges. Two defendants agreed to pay civil penalties of \$40,000 each. All four defendants also consented to the entry of final judgments permanently enjoining them from violating the FCPA.

Review of Enforcement Activity: Key Takeaways

- Prison sentences for individuals getting **longer and longer**
- Government using more traditional investigative techniques such as undercover operations, wiretaps, and encouraging cooperation to net individuals
- Government continues aggressively to prosecute individuals

Review of Enforcement Activity

- Actions against companies

Review of Enforcement Activity: Corporations

- “To be sure, we are not focusing on individuals to the exclusion of corporations. We will continue to insist on corporate guilty pleas or to bring criminal charges against corporations in appropriate cases – when the criminal conduct is egregious, pervasive and systemic, or when the corporation fails to implement compliance reforms, changes to its corporate culture, and undertake other measures designed to prevent a recurrence of the criminal conduct. We will continue to insist on appropriately stiff corporate fines, applying a consistent, principled approach that considers the facts and circumstances within the Department’s established framework and that is guided by the Sentencing Guidelines in arriving at an appropriate sanction.”
 - Remarks of Lanny A. Breuer (Feb 25, 2010)

Review of Enforcement Activity: Status Report on 2010 Enforcement

- Summary of Q1-Q2 2010 corporate enforcement activity
 - Criminal/DOJ Resolutions: 5
 - Civil Enforcement/SEC Resolutions: 5

Review of Enforcement Activity: Summary – DOJ Resolutions

- Criminal / DOJ resolutions:
 - Daimler A.G.
 - BAE Systems plc
 - Technip S.A.
 - Innospec
 - Snamprogetti

Review of Enforcement Activity: Summary – SEC Resolutions

- Civil enforcement / SEC resolutions
 - Daimler A.G.
 - Veraz Networks, Inc.
 - Technip S.A.
 - Innospec
 - Snamprogetti

Review of Enforcement Activity: Corporate FCPA Settlements – Daimler AG

- On April 1, the DOJ and SEC announced that they had resolved charges related to Daimler AG's worldwide sales practices
- Daimler AG's Russian and German subsidiaries each pleaded guilty to one count of violating the anti-bribery of the FCPA and conspiracy to violate the FCPA. Daimler AG also entered into a DPA and agreed to the filing of a criminal information charging it with one count of conspiracy to violate the books and records provisions of the FCPA and one count of violating those provisions.

Review of Enforcement Activity: Corporate FCPA Settlements – Daimler AG

- Widespread violations
 - Daimler admitted that it and its subs bribed government officials in Russia, Croatia, and China in order to secure contracts to sell vehicles
 - The government alleged that Daimler paid at least \$56 million in improper payments over a period of more than 10 years
 - The payments allegedly involved more than 200 transactions in at least 22 countries, including Latvia, Nigeria, Russia, Serbia, Vietnam, and others
 - Daimler earned \$1.9 billion in revenue and at least \$90 million in illegal profits through these tainted sales transactions, which involved at least 6,300 commercial vehicles and 500 passenger cars
- Hefty Fines
 - In total, Daimler AG and its subsidiaries will pay **\$93.6** million in criminal fines and penalties
 - Daimler will also pay **\$91.4** million in disgorgement of profits to settle a related SEC Complaint

Review of Enforcement Activity: Corporate FCPA Settlements – BAE Systems plc

- On March 1, British arms-maker BAE Systems plc plead guilty to one count of conspiracy
- Part of BAE's conduct involved lying to the US Government about its FCPA Compliance Program. According to the DOJ, BAE “knowingly and willfully failed to create mechanisms to ensure compliance with these legal prohibitions on foreign bribery” and the “gain to BAE from the various false statements and failures to make required disclosures to the U.S. government was more than \$200 million.”
- In total, BAE was fined **\$400** million for fraud and for violating the Arms Export Control Act and International Traffic in Arms Regulations. BAE also agreed to appoint a corporate compliance monitor.

Review of Enforcement Activity:

Corporate FCPA Settlements – Veraz Networks, Inc.

- On June 29, 2010, the SEC announced that Veraz Networks, Inc., a San Jose, California-based VOiP company, paid \$300,000 to settle charges brought by the SEC that it violated the books and records and internal controls provisions of the FCPA by making illegal payments to foreign officials in China and Vietnam
- Veraz engaged a consultant in China who in 2007 and 2008 gave gifts and offered improper payment together valued at approximately \$40,000 to officials at an unidentified government-controlled telecommunications company in China in an attempt to win business for Veraz
- The complaint also alleged that in 2007 and 2008, another Veraz employee made improper payments to the CEO of a government controlled telecommunications company in Vietnam to win business for Veraz, including flowers sent to the wife of that company's CEO
- Veraz's settlement with the SEC only came after a long and expensive process of investigation and voluntary disclosure. Veraz reported in November 2009 that it had spent \$2.5 million to that point to investigate and handle the FCPA compliance issues.
- As discussed later, the Veraz settlement was only the latest in a long line of enforcement actions involving telecom companies

Review of Enforcement Activity:

Corporate FCPA Settlements – Technip S.A.

- On June 28, Paris-based engineering and construction firm resolved FCPA-related charges resulting from a decades-long scheme to bribe Nigerian officials in order to win huge contracts for engineering, procurement and construction of natural gas facilities in that country
- Technip, along with Kellogg Brown & Root, Snamprogetti of the Netherlands, and JGC of Japan were part of the four-company JV called TSKJ, which won four contracts from to natural gas facilities in Nigeria worth more than \$6 billion. The JV bribed a range of Nigerian officials, including top-level executive branch officials, in order to win the contracts.
- Technip agreed to pay the DOJ a **\$240 million** criminal penalty
- It also settled a civil complaint filed by the SEC by disgorging **\$98 million** in profits
- Technip’s two-year deferred prosecution agreement with the DOJ requires Technip to retain an independent compliance monitor and cooperate in ongoing investigations
- Technip, like its partners in the TSKJ JV, is part of the Oil and Gas Services industry—and industry specifically targeted for FCPA enforcement

Review of Enforcement Activity: Corporate FCPA Settlements – Snamprogetti Netherlands B.V.

- Most recently, on July 7, the government announced that Snamprogetti Netherlands B.V. and its parent company ENIS.p.A of Italy will pay \$365 million to resolve FCPA-related charges for Snamprogetti's role in the TSKJ-Nigeria joint venture
- Charges
 - The DOJ charged Dutch-based Snamprogetti one count of conspiracy and one count of aiding and abetting violations of the FCPA. In a companion suit, the SEC alleged that Snamprogetti and ENI violated the anti-bribery and recordkeeping and internal controls provisions in Sections 30A and 13(b)(5) of the Securities Exchange Act of 1934 and Rule 13b2-1
- Facts
 - These penalties are for Snamprogetti's role in the Nigeria TSKJ JV
- Penalties
 - Snamprogetti will pay a \$240M criminal penalty to resolve the DOJ charges
 - Snamprogetti and ENI will also pay \$125 in disgorgement to resolve the SEC's charges
 - Snamprogetti and ENI also entered into a two-year deferred prosecution agreement with the DOJ. Interestingly, the agreement doesn't require appointment of a compliance monitor

HOW THE UK BRIBERY ACT MIGHT IMPACT YOUR BUSINESS

Bribery Act: New Offences

- New primary offences of bribing and being bribed
- Set out in the form of 6 “cases”, 2 of active bribery and 4 of passive bribery
- Very widely drafted
- 2 elements common to all 6 cases
 - A “financial or other advantage” is given, promised or requested; and
 - There is “improper” performance of a “function or activity”

New Offence of Bribing Another Person

- A person offers, promises or gives a financial or other advantage directly or indirectly to another person
 - Intending the advantage to induce a person to perform a function or activity improperly or to reward a person for the improper performance of a function or activity (Case 1); or
 - Knowing or believing that the acceptance of the advantage in itself constitutes the improper performance of a relevant function or activity (Case 2).

What Is a “Function or Activity?”

- Two requirements
 - A function of a public nature, or an activity connected with a business or performed in the course of employment or by or on behalf of a body of persons AND
 - The person performing the function or activity is expected to perform it in good faith, impartially or is in a position of trust by virtue of performing it
- Covers virtually all activities
- Does not matter that the function or activity has no connection with the UK and is performed wholly outside it

What Does “Improperly” Mean?

- The function or activity will be performed improperly if the person performing it is in breach of an expectation that it will be performed:
 - In good faith;
 - Impartially; or
 - In accordance with an obligation of trust
- “Expectation” = what a reasonable person in the UK would expect unless permitted by local written law

New Offence of Being Bribed

- A person requests, agrees to receive or accepts a financial or other advantage, directly or indirectly
 - Intending that, in consequence, a relevant function or activity should be performed improperly (Case 3)
 - And the request, agreement or acceptance itself constitutes the improper performance of a relevant function or activity (Case 4)
 - As a reward for the improper performance of a relevant function or activity (Case 5)
 - Where, in anticipation of or in consequence of requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly (Case 6)
 - Cases 4 to 6 do not require any criminal intent

New Offence of Bribing a Foreign Public Official

- A person who bribes a foreign public official is guilty of an offence if:
 - He intends to influence the foreign public official in his/her capacity as a foreign public official and the official is not permitted by written law to be so influenced; and
 - That person also intends to obtain or retain business or an advantage in the conduct of business
- No criminal intent required
- “Foreign Public Official” = legislative, administrative or judicial position; official/agent of a public international organisation

Liability of Senior Officers

- If a company or partnership commits a bribery offence a “Senior Officer” may also be liable if he/she “consented or connived” in the commission of that offence
- “Senior Officer” – directors, secretary, manager, partner or someone purporting to act in that capacity

New Corporate Offence of Failing to Prevent Bribery

- A commercial organisation will commit an offence if a person associated with it bribes another intending to obtain or retain business for that commercial organisation or to obtain or retain a business advantage
- “Associated persons” is broadly defined and includes any person who “performs services for or on behalf of the relevant commercial organisation” – may include subsidiaries, employees, agents, JV Partners, consortium members
- Extends to all commercial organisations carrying on business in the UK
- Strict liability offence – one statutory defence – the commercial organisation had “adequate procedures” in place to prevent such bribery from occurring

Penalties

- Individuals: unlimited fine and/or up to 10 years imprisonment
- Companies/partnerships: unlimited fine and/or civil recovery order and/or serious crime prevention order (including appointment of a monitor). NB may also be debarred from tendering for public contracts

Territorial Application

- If any part of the bribery offence takes place in the UK, the UK may take jurisdiction
- British Nationals, UK residents and UK companies/partnerships who commit acts of bribery abroad are subject to prosecution in the UK even if no part of the bribery offence takes place in the UK
- For the new corporate offence of failing to prevent bribery, the bribery may take place wholly outside the UK

Uncertainty about Interpretation and Enforcement

- Gifts, hospitality and donations could all be seen as bribes
- Individuals can be liable even for unwittingly giving or receiving
- No “*de minimis*” exemption for facilitation payments
- Not just UK-incorporated companies
- Important aspects are left for exercise of prosecutorial discretion

COMPLIANCE AND PREVENTION BEST PRACTICES

Compliance Programs Remain Key Government Focus in 2010

- “We in the Criminal Division combat foreign bribery each and every day. And as we go about our business, we are looking carefully at lapses in corporate compliance. Why? ... Our preference, like yours, is for these crimes to be prevented in the first instance. And the only way that can happen in your organizations is through a robust, state-of-the-art compliance program and a true culture of compliance.”
 - Remarks of Lanny A. Breuer (May 26, 2010).

Compliance Issues and the FCPA

- Recent Actions highlighting compliance failures
 - BAE – False statements to the U.S. Dept of Defense regarding compliance with the FCPA
 - Siemens – No real compliance program or tone at the top
 - UTStarcom – Travel and entertainment

Compliance and the FCPA (cont'd)

Post investigation improvements to program

- Parker Drilling Company's Form 10-Q dated May 7, 2010:
 - We have taken certain steps to enhance our anti-bribery compliance efforts, including retaining a full-time Chief Compliance Officer who reports to the Chief Executive Officer and Audit Committee, and implementing efforts for the adoption of revised FCPA policies, procedures, and controls; increased training and testing requirements; contractual provisions for our service providers that interface with foreign government officials; due diligence and continuing oversight procedures for the review and selection of such service providers; and a compliance awareness improvement initiative that includes issuance of periodic anti-bribery compliance alerts.

Developments in Sentencing Guidelines

- In April, the U.S. Sentencing Commission approved changes to the compliance-and-ethics-program related provisions of the Federal Sentencing Guidelines for Organizations. Changes should go into effect in November.
- The following are the Key Changes
 - Compliance Credit
 - Eliminates the automatic bar to the **compliance credit** based on the actions of high-level personnel. The Guidelines previously permitted a reduction of the culpability score, and therefore the sentence, for convicted organizations if they had an effective compliance and ethics program in place at the time of the offense, but only if high-level personnel of the organization **did not** participate in, condone, or were willfully ignorant of the offense
 - **However**, Companies are only eligible for the credit if they can show that (1) their compliance officer had direct access to the board of directors or subgroup thereof, (2) their compliance program detected the criminal activity, (3) the company quickly self-disclosed it to federal officials, and (4) no compliance official participated or was willfully ignorant of the fraud.
 - Clarification of Effective Compliance and Ethics Program
 - New commentary to the guidelines specifies that companies should, following the discovery of criminal conduct, “assess[] its compliance and ethics program and make[] modifications necessary to ensure the program is effective.”
 - This may include “the use of an outside professional advisor.”

Recent OECD Guidance on Compliance

- In December 2009 and in February 2010, an OECD working group representing 38 Nations released its “Recommendation for Further Combating Bribery of Foreign Public Officials” and its “Good Practice Guidance on Internal Controls, Ethics and Compliance”
- The Recommendations provide that “member countries should encourage . . . companies to develop and adopt adequate . . . [Compliance and Ethics programs] or measures for the purpose of preventing and detecting foreign bribery. . . .”
- **However**, the OECD guidelines go further than the U.S. Sentencing Guidelines—they specify that countries should consider in some instances C&E programs “in their decisions to grant public advantages, including public subsidies, licences, public procurement contracts, contracts funded by official development assistance, and officially supported export credits
- The guidelines also emphasize third-party compliance measures
- Mark Mendelsohn, deputy chief of the Fraud Section and a key liaison to the OECD, spoke at an anti-corruption conference in February and said the Justice Department approves of the OECD guidance

Recent Developments in the UK

- The Bribery Act imposes a statutory duty on the UK Government to issue guidance as to the procedures that commercial organisations should put in place – no guidance has yet been issued
- Any guidance issued by the UK Government will most likely set out broad principles and illustrative good practice examples rather than detailed and prescriptive standards
- The statutory guidance is likely to require the following:
 - Senior management responsibility for establishing an anti-corruption culture – “tone from the top”
 - Regular comprehensive assessment of the corruption risks to which a commercial organisation is exposed
 - Policies and procedures to prevent corruption which are clear, practical and accessible
 - Effective implementation of policies and procedures
 - Effective due diligence on all business partners
 - Monitoring, review and updating of anti-corruption systems

QUESTIONS

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