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# FCPA Enforcement In the Oil & Gas Industry

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## Overview of Program

- Overview of the Foreign Corrupt Practices Act
- Update on Enforcement Trends: Implications for U.S. Oil Services Companies and Foreign Operations
- Conducting an Internal Investigation that will Satisfy the Government
- Current Investigations Involving Nigerian Customs

# Overview of the Foreign Corrupt Practices Act

# Overview of FCPA

## FCPA History

- Foreign Corrupt Practices Act of 1977
  - December 20, 2007 will mark 30<sup>th</sup> anniversary
  - Amended in 1988 and 1998
  - Passed following Congressional hearings addressing corporate slush funds, illegal campaign contributions and international bribery
  - Securities and Exchange Commission reported in 1976 that 95 companies voluntarily disclosed questionable or illegal payments
  - First aggressive anti-bribery statute among developed nations

## Overview of FCPA

### **FCPA Elements: Anti-Bribery**

- Anti-Bribery
  - Elements:
    - Offer, payment, promise or authorization to pay
    - Anything of value
    - To any foreign official
    - For purposes of influencing any act or decision
    - In order to obtain or retain business

## Overview of FCPA

### **FCPA Elements: Anti-Bribery (cont.)**

- Bribe payments may result in criminal or civil charges
- Small “grease” payments to facilitate routine activities are not prohibited:
  - Example: Obtaining permits, licenses or other official documents to qualify a person to do business in a foreign country
- Reasonable and bona fide expenditures, such as travel and lodging

## Overview of FCPA

### **FCPA Elements: Accounting Provisions**

- Initial purpose was to prevent unaccounted-for corporate slush funds used to pay bribes
- Accounting Provisions Requirements
  - Issuers must make and keep accurate books and records, and devise and maintain a system of internal accounting controls
  - Knowingly falsifying any book, record or account may result in a criminal prosecution

## Overview of FCPA

### **FCPA Elements: Accounting Provisions (cont.)**

- Persons / Entities Subject to Accounting Provisions:  
Issuers
  - U.S. public companies; and,
    - Foreign subsidiaries where issuer has majority equity ownership
  - Foreign companies with ADRs listed on U.S. exchanges



## Overview of FCPA

### Who Enforces the FCPA

- Criminal violations prosecuted by the Department of Justice
- Civil violations enforced jointly by Securities and Exchange Commission and Department of Justice
- Close coordination between SEC and Justice Department
- Both can impose significant fines
  - Record: \$44.1 million monetary sanction (*Baker Hughes*)

## Overview of FCPA

### **Jurisdiction: Who Is Subject to the FCPA**

- Corporations
  - All “Issuers,” including employees of Issuers
  - All U.S.-based private companies (“domestic concerns”)
- Natural persons
  - Any United States citizen for any conduct internationally
  - Any non-United States citizen:
    - When conduct occurred while in the U.S., OR
    - When instrumentalities of interstate commerce used
      - phone, mail, e-mail, facsimile, U.S. bank transaction

## Overview of FCPA

### **Penalties: Criminal and Civil**

- Corporate sanctions:
  - Fines of up to \$2 million for each violation of the anti-bribery prohibition
  - Disgorgement of proceeds associated with improper payments
  - Injunction to prevent future violations
  - Suspension and debarment

## Overview of FCPA

### **Penalties: Criminal and Civil (cont.)**

- Individual sanctions:
  - Up to \$10,000 per civil and \$100,000 per criminal violation
    - Government prohibits indemnification for fines
  - Up to 5 years imprisonment
    - Recent sentences: 36 months, 18 months, 6 months
  - Equitable remedies: injunction, bar from serving as director or officer

## Overview of FCPA

### How Bribes are Paid

- Cash / credit
  - Direct cash payments:
    - Slush funds
    - Contractual relationships
    - Petty cash
  - Credit to third party – pools funds for later distribution to government officials

## Overview of FCPA

### **How Bribes are Paid (cont.)**

- Other things of value
  - Payments for fictitious goods or services
- False invoices to generate funds
- Family members of government officials
  - Spouses, children, cousins

## Overview of FCPA

### **How Bribes are Paid (cont.)**

- Consultants / third parties / intermediaries
  - Special consultants or standard professional service providers may pay a portion of their fee to government officials
  - Liability even for payments made without the knowledge of the corporation

## Overview of FCPA

### **How Bribes are Paid (cont.)**

- Kickback schemes
  - Contract award may contain kickback components operating as payments to government officials
    - Example: Iraq UN Oil-for-Food Program



## Overview of FCPA

### **Importance of Corporate Compliance Policy**

- Preventive medicine with respect to possible violations
- Mitigating consideration in event of violation
- Potential exposure in M&A transactions
  - ABB Ltd.
  - GE/InVision
  - Titan Corp.
- Sarbanes-Oxley Act of 2002
- Suspension or debarment from government contracting

# Overview of FCPA

## Top Ten Elements of an Effective Compliance Program

1. Instill a corporate culture of compliance
2. Issue a written compliance policy
3. Assign implementation responsibility
4. Promulgate specific compliance measures
5. Provide periodic training programs and ready access to legal advice
6. Require periodic self-certification of compliance
7. Maintain compliance records
8. Apply disciplinary measures as appropriate
9. Conduct periodic internal and external compliance audits
10. Adjust the compliance program to current risk assessment

## Overview of FCPA

### **Due Diligence: Third Party Intermediaries and Joint Venture Partners**

- Agents, third party consultants and potential joint venture partners
- Due diligence before engagement
- Written contract
  - Agree to comply with FCPA
  - Document all payments
  - Audit rights
  - Certificate of compliance

## Overview of FCPA

### **Due Diligence: Mergers & Acquisitions**

- Due diligence: the rationale
  - The spectre of successor liability
  - The opportunity to resolve potential liabilities
  - The determination of transaction structure and value
  - The assessment of corporate integration issues
  - Proposed Lockheed – Titan merger: scuttled
- Due diligence: the process
  - Risk assessment
  - Compliance assessment

**Update on Enforcement Trends:  
Implications for U.S. Oil Services  
Companies and Foreign Operations**

## Update on Enforcement Trends

### **Recent Enforcement Activity**

- October 2006: DOJ criminal official said: “We are enforcing the FCPA to root out global corruption and preserve the integrity of the world’s markets.”
- More resources dedicated to FCPA investigation and prosecution than ever before
- 2005: 5 criminal prosecutions
- 2006: 8 criminal prosecutions

## Update on Enforcement Trends

### **Recent Enforcement Activity (cont.)**

- 2007: 12 criminal prosecutions
  - 6 Corporations
  - 7 Individuals: 3 plead guilty, 4 awaiting trial
  - 3 sentences: 36 months, 18 months, 6 months
- Current status:
  - 45 open FCPA investigations involving 55 companies in 24 separate countries
- Industries under scrutiny: petrochemical, telecoms, aerospace, oil exploration, agriculture, pharmaceuticals

## Update on Enforcement Trends

### **Recent Enforcement Activity: Oil and Gas Industry**

- Statoil ASA
- Vetco Gray
- Baker Hughes
- Bristow Group Inc.
- Paradigm B.V.
- Nigerian Customs Enforcement – Panalpina Customers



# Update on Enforcement Trends

## Recent Corporate Settlements

- Schering-Plough (2004)
  - Payments to director of private foundation who was also head of government health authority in Poland
  - Key point: definition of “foreign official” to trigger liability?
    - Know your business partners and customers. In many countries, large institutions are government-owned, so the employees may qualify as a foreign official

## Update on Enforcement Trends

### Recent Corporate Settlements (cont.)

- Diagnostic Products Corp. (2005)
  - Payments to physicians and laboratory personnel at government-owned hospitals in China
  - Key point: “foreign official”
    - Government hospital employees viewed as foreign officials

## Update on Enforcement Trends

### Recent Corporate Settlements (cont.)

- ABB / Vetco Gray Cases
  - Pair of cases in 2004 and 2007 arising from conduct at Vetco Gray, former UK and U.S. subsidiaries of ABB Ltd., Swiss company
  - Total fines: \$30.5 million in criminal penalties; \$5.5 million disgorgement

# Update on Enforcement Trends

## Recent Corporate Settlements (cont.)

- Key point: Jurisdiction
  - Swiss parent company traded ADRs on NYSE; conduct of UK sub United States
- Key point: Due diligence in acquisition
  - When ABB sought sale to private equity buyer, due diligence identified continuing FCPA problems
- Key point: Recidivism
  - Same Vetco Gray sub hit with higher fine in 2007
- Key point: Prosecution of individuals
  - SEC case against three executives; settled for penalties/disgorgement

## Update on Enforcement Trends

### Recent Corporate Settlements (cont.)

- Statoil (2006)
  - Norwegian-owned oil company paid bribes to Iranian government official to obtain oil field development business in Iran.
  - Key point: Jurisdiction
    - Issuer, listed on NYSE
    - Payments routed through New York bank
  - Key point: Enforcement in home country
    - U.S. authorities considered the \$3 million fine by Norway as insufficient

## Update on Enforcement Trends

### Recent Corporate Settlements (cont.)

- GE / InVision (2005)
  - GE discovered FCPA conduct by target company
  - Target of acquisition enlisted consultants to obtain contracts for explosives detection equipment in China, Thailand and Philippines
  - Key point: Due diligence in acquisition
    - Pre-acquisition due diligence revealed FCPA violations

# Update on Enforcement Trends

## Recent Corporate Settlements (cont.)

- Titan Corporation (2005)
  - Payment to election campaign to obtain telephony contract in Republic of Benin
  - Key point: Due diligence in acquisition
    - Prevented the deal from closing
  - Key point: Compliance program must be strong
    - Poor compliance program caused U.S. to prosecute

## Update on Enforcement Trends

### Recent Corporate Settlements (cont.)

- Baker Hughes (2001)
  - Payments to influence tax or customs treatments in Indonesia or Haiti
  - Key point: “Business Nexus”
    - Broad definition of payments “to obtain or retain business”
    - May include payments to reduce tax obligations
    - Interpretation confirmed by Fifth Circuit in *American Rice* (2004)
    - First Joint Civil action by SEC and Justice Department



# Update on Enforcement Trends

## Recent Corporate Settlements (cont.)

- Baker Hughes (2007)
  - Payments through agents to obtain oil services business in Kazakhstan
  - Books and records / internal controls violations related to Indonesia, Nigeria and Angola
  - Significant Monetary Penalty: \$44.1 million
    - \$11 million criminal fine
    - \$33.1 million disgorgement, fine and prejudgment interest
  - Key point: Recidivism
    - Harsher sanctions for repeat offenders

## Update on Enforcement Trends

### Recent Corporate Settlements (cont.)

- Dow Chemical (2007)
  - Payments to obtain agricultural product registrations in India
  - Key points: Voluntary disclosure, cooperation, strength of internal compliance program
    - Result: no external monitor required
  - Key point: Due diligence in joint venture with local partner

## Update on Enforcement Trends

### Recent Corporate Settlements (cont.)

- Textron Inc. (2007)
  - Initiated as Oil-for-Food investigation, but broadened to include review of improper payments in India, Indonesia, Bangladesh, Egypt and UAE.
  - Key point: Cooperation and voluntary disclosure
    - No criminal charge, and no monitor.
    - Still a total monetary sanction of \$4.65 million

## Update on Enforcement Trends

### Recent Corporate Settlements (cont.)

- York International (2007)
  - Initiated as Oil-for-Food investigation but broadened to include review of payments to obtain government contracts in Bahrain, Egypt, India, Turkey and UAE
  - Key point: Large monetary sanction: \$22 million

# Update on Enforcement Trends

## Recent Individual Prosecutions

- Increase in the number of enforcement actions brought against individual defendants by both the SEC and DOJ
  - 2005: Three people, including the former head of AIG's private equity group, indicted for bribes associated with privatizing the oil industry of Azerbaijan
  - 2006:
    - SEC settled a suit against four Vetco Gray officials for conduct associated with oil field development in Nigeria. Three were UK citizens working in the UK
    - SEC settled a suit against former Willbros Executive, Jim Bob Brown, formerly a managing director in the Nigeria and Latin American operations. Brown plead guilty to conspiracy to violate the FCPA

## Update on Enforcement Trends

### Recent Individual Prosecutions (cont.)

- 2007:
  - 7 criminal prosecutions of individuals:
    - 3 guilty pleas
      - Example: Former ITXC executives (to be sentenced October 29, 2007)
    - 4 indicted
  - 3 sentences: 36 months, 18 months, 6 months

# Update on Enforcement Trends

## Current Developments

- Siemens
  - Investigation of alleged bribes in multiple countries to obtain a wide variety of business
  - Allegations go to the executive suite
  - Settled in Germany, but investigations in U.S. ongoing
- Bribery investigations in U.S., Germany, UK, France, Italy, India, Indonesia, Costa Rica, Lesotho and Thailand.

Conducting an Internal  
Investigation that will Satisfy  
the Government



## Conducting and Reporting on an Investigation

- Conducting document preservation and review
- Conducting interviews
- Developing remedial recommendations
- Memorializing investigative steps and findings
- Communications with the board/auditors

# Conducting and Reporting on an Investigation

## **Preserving Documents and Information**

- Determine the scope of the Investigation
  - Dates
  - Key Players
  - Departments or Business Units
  - Documents
- Counsel should insist on complete access to:
  - Witnesses
  - Documents
  - Electronic data/emails

## Conducting and Reporting on an Investigation

### **Preserving Documents and Information (cont.)**

- Company must suspend automatic document destruction practices to avoid inadvertent destruction
- Counsel must work with IT department to understand company's computer systems and steps necessary to preserve electronic data
- Issue preservation memo
- Preserve back-up tapes
- Document preservation steps
- Criminal risks

## Conducting and Reporting on an Investigation

### **Preserving Documents and Information (cont.)**

- Suspend routine or automatic disposal of documents and electronic data
  - Includes:
    - Email accounts
    - PDAs
    - Laptops
    - Zip drives
    - Electronic calendars
    - Instant messaging
    - Voice mails
  - Consider making mirror image of accounts of key employees
  - Consider help from outside experts

## Conducting and Reporting on an Investigation

### **Preserving Documents and Information (cont.)**

- Work with IT department to understand:
  - Computer hardware and systems
  - Applications and software programs
  - Company's databases, backup procedures and archival data
  - Company's Backup Procedures
  - Company's Archival Data
  - Company's Databases

## Conducting and Reporting on an Investigation

### **Preserving Documents and Information (cont.)**

- Issue preservation memo
  - Identify all documents to be retained
  - Identify all persons who may possess relevant data, including employees overseas
  - Identify third parties who may have relevant data
  - Consider having recipients acknowledge receipt and understanding
  - Establish procedure for preserving data of departing employees
  - Reissue Preservation Memo periodically

## Conducting and Reporting on an Investigation

### Preserving Documents and Information (cont.)

- Counsel must monitor compliance
  - “Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.” *Zubulake v. UBS Warburg*, 2004 WL 1620866 (S.D.N.Y.)
  - Court held document “hold memos were not sufficient, since they subsequently were ignored.” *In re NTL Securities Litigation*, 2007 WL 241344 (S.D.N.Y.)

## Conducting and Reporting on an Investigation

### Preserving Documents and Information (cont.)

- Back-up tapes
  - Companies need not preserve every email and backup tape as such a rule would “cripple large corporations.” *Zubulake*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003)
  - Where backup tapes are sole source of discoverable information, may be required to preserve tapes.  
Fed. R. Civ. P. 37(f), committee notes
  - Consider retaining then-existing backup tapes for relevant personnel



## Conducting and Reporting on an Investigation

### **Preserving Documents and Information (cont.)**

- Document rationale for preservation decisions to support good faith showing
  - Outline steps taken immediately on service of subpoena or when duty to preserve attaches
  - Identify groups of employees instructed to preserve data

## Conducting and Reporting on an Investigation

### Preserving Documents and Information (cont.)

- Criminal Risks
  - Employees must understand the need to cooperate
  - Sarbanes-Oxley: It is a criminal act to deliberately destroy information subject to a preservation obligation
  - Criminal obstruction statute: section 802 of the Sarbanes-Oxley Act of 2002 (18 U.S.C. § 1519):
    - Whoever knowingly alters or destroys any document
    - With the intent to impede, obstruct, or influence the investigation
    - Shall be fined or imprisoned not more than 20 years, or both

## Conducting and Reporting on an Investigation

### **The Interviews**

- Company employees should be informed of the process and guidelines for the interviews
- How to handle request by employee for obtaining their own outside counsel
- How to handle interviews with outsiders to the company: risks and rewards

# Conducting and Reporting on an Investigation

## The Interviews (cont.)

- Tips and Strategies for Interviews
  - Do not allow employee to impose conditions on the interview
  - Ask probing questions; not prosecutorial
  - Ask the “w” questions: who, what, where, when, why
  - The goal is to obtain credible information
  - Use documents and other information
  - Interview one witness at a time

# Conducting and Reporting on an Investigation

## Remediation

Developing Remedial Recommendations:

1. Nature and seriousness of offense
2. Pervasiveness of wrongdoing within corporation
3. Corporation's prior history
4. Cooperation and voluntary disclosure
5. Corporate compliance programs
6. Restitution and remediation
7. Collateral consequences
8. Adequacy of the prosecution of individuals responsible for the corporation's malfeasance
9. Non-criminal alternatives

# Conducting and Reporting on an Investigation

## Remediation (cont.)

Sample Remedial Recommendations:

1. Hire your own corporate monitor, if necessary
2. Institute robust FCPA policies and procedures
3. Institute periodic reviews to detect FCPA concerns
4. Books and records
5. Institute due diligence process for joint ventures and business combinations
6. FCPA education and training
7. Termination of wrongdoers (SOX Section 806 - civil remedy for whistle-blowers who suffer retaliation)
8. Termination or renegotiation of problematic contract or agreement, if necessary
9. Review agents and consultants periodically
10. Document all of the above steps

# Conducting and Reporting on an Investigation

## Remediation (cont.)

- Monitors and voluntary disclosures
  - Most recent DOJ and SEC resolutions impose an independent monitor / compliance consultant:
    - Third party overseer for period of 2-3 years
    - Reports directly to DOJ/SEC
    - Additional expense / management time
    - Required in Statoil, Baker Hughes, Vetco Gray, York resolutions
    - Not required in Dow Chemical, Textron resolutions
  - Voluntary disclosure:
    - Credit for cooperation

# Conducting and Reporting on an Investigation

## **The Report: to write or not to write**

- Should the report be written or not? Benefits and costs
- Content of the report depends on the intended purpose
- Assume the report is discoverable
- Considerations for limited circulation and protecting document
- Written reports should summarize the following:
  - Circumstances that led to the investigation
  - The investigative steps that were taken
  - The facts revealed by the investigation
  - Internal policies or practices relevant to the events
- Steps taken to “correct” the issues identified by the investigation



# Conducting and Reporting on an Investigation

## Communication with Client

- Communication with the Board/Special Committee/Audit Committee
  - If investigation is directed by Audit Committee, scope and progress should be discussed periodically
  - Discuss requests or need to expand scope of investigation
  - Discuss “request” or “gentle suggestion” of waiver
  - Role of management in wrongdoing, if any
  - Report: To write or not to write
  - Resolving prosecution and enforcement action, if any

# Current Investigations Involving Nigerian Customs

# Current Investigations Involving Nigerian Customs

## Timeline

- February 2007: Vetco Gray resolved an FCPA matter regarding “a major international freight forwarding and customs clearing company,” and spurred a number of other companies to review their operations in Nigeria
- Four follow-on disclosures announced regarding payments in Nigeria for customs-related matters:
  - April 26, 2007: Tidewater
  - June 4, 2007: Noble
  - June 26, 2007: GlobalSantaFe
  - June 29, 2007: Global Industries
- July 2, 2007: DOJ “invited” numerous additional companies to “discuss” their engagement of the customs clearing company.
- July 24, 2007: Panalpina disclosed DOJ investigation

## Current Investigations Involving Nigerian Customs

### Questionable Line Items

- *Vetco Gray* identifies invoice descriptions that should raise red flags:
  - Express Courier Service
  - Local processing fees
  - Interventions, a “euphemism” for bribes
  - Evacuations

## Current Investigations Involving Nigerian Customs

### **Lessons Learned from Nigerian Customs Investigations**

Any company doing business abroad should take immediate steps to:

- Perform due diligence on freight forwarding or customs clearing agents
- Review and implement appropriate accounting controls to detect past violations of FCPA and prevent future violations
- Train company employees to understand conduct that violates FCPA
- Disclose to the government sooner rather than later

## Current Investigations Involving Nigerian Customs

### Practical Tips

- Have Up-to-Date Policies
  - Signed acknowledgement from employees documenting receipt
  - Periodic reminders
  - “Hot Line” to report any suspected violations of the FCPA

## Current Investigations Involving Nigerian Customs

### Practical Tips (cont.)

- Engage in Constant Training
  - Detailed training materials approved by experienced FCPA counsel
  - Regularly-scheduled training
    - Training logs, sign-in sheets to thoroughly document training
  - Testing employees' FCPA knowledge
  - Include contract employees, consultants, etc.

## Current Investigations Involving Nigerian Customs

### **Practical Tips (cont.)**

- Monitor Agents and Consultants
  - Documented and up-to-date due diligence file on every agent
  - FCPA anti-bribery provisions in all consulting agreements
  - Periodic certifications of compliance
  - Include agents in FCPA training programs



## Current Investigations Involving Nigerian Customs

### **Practical Tips (cont.)**

- Periodically review books and records/accounting controls
  - Compliance testing
  - Role of Internal Audit

## Current Investigations Involving Nigerian Customs

### Practical Tips (cont.)

- When an issue Arises
  - Contact outside FCPA counsel immediately
    - Any preliminary investigation should be done by outside counsel
    - Privilege issues
    - Future waiver of privilege
  - Take immediate, documented measures to preserve documents
  - Determine whether immediate personnel changes are appropriate
    - Placing “Special Projects” supervision over affected area
    - Leaves of absence for employees implicated in payments
  - Consider implementing additional temporary controls
    - Legal department/outside counsel review of invoices/payments

## Hypothetical Fact Pattern No. 1

- Houston based, NYSE-listed company, seeks drilling license renewal in Brazil
- Entitled to license renewal upon application, with nominal fee (less than \$1,000)
- Local consultant assisting with renewal application reports that government official found paperwork deficient and requires \$10,000 payment to approve the license.
- Outside counsel advises that the exception for facilitation payments might apply where an approval requires no discretion, but that under this circumstance, needs to consult FCPA expert
- Country manager and Houston-based in-house counsel decide that this is a permissible “grease” payment and authorize payment to the consultant without seeking counsel
- Consultant’s invoice booked as “Consultant Services Rendered”

## Hypothetical Fact Pattern No. 2

- Europe-based oil services firm maintains offices in Houston
- Team seeking oilfield development concession in Kazakhstan convenes a conference call among Europe, Astana and Houston
- Astana-based employee reports on a consultant that may assist securing the concession:
  - Little experience in the oil services industry, but well-connected politically
- Houston-based employee directs immediate retention of the consultant, including payment of significant retainer

# Questions