

## LEGAL COLUMN

# Anti-bribery enforcement reaches further

Developments in anti-bribery enforcement make clear that aggressive US regulators are reaching further outside US borders to enforce the Foreign Corrupt Practices Act. European companies accessing US capital markets and conducting business within the US must pay heightened attention to FCPA compliance matters, and react quickly to address internal concerns about improper payments. By **David Krakoff**, partner, and **James Parkinson**, associate, of Mayer Brown Rowe & Maw.

Never has the US Foreign Corrupt Practices Act (FCPA) been more relevant. After nearly 30 years on the books, the FCPA has proved a powerful vehicle for corporate change at US companies. Although the Act has not entirely eliminated improper payments, the FCPA is firmly embedded in the compliance plans of major US companies.

Recent enforcement activity makes clear, however, that US regulators are now looking beyond US shores to extend FCPA enforcement to non-US companies. A top official at the US Department of Justice (DOJ) has said: "We are enforcing the FCPA to root out global corruption and preserve the integrity of the world's markets." While this aggressive view as to US reach may rankle, US regulators successfully pursue non-US companies.

Three clear enforcement trends must be on the agenda for all companies accessing US capital markets or conducting business in the United States: international jurisdictional reach, soaring monetary implications, and the imposition of compliance monitors.

## Aggressive jurisdictional reach

The DOJ has made its most aggressive assertion of jurisdiction yet under the FCPA, a disquieting event for those in the executive suite, reinforcing the trend first suggested in 2004 when the Swiss company ABB pleaded guilty to bribes in Nigeria, Angola and Kazakhstan, and paid fines and disgorgement of US\$16m.

Statoil, a Norwegian corporation that trades shares on a US exchange, entered into

a contract with a well-connected Iranian official. After the company made two payments to the official totalling US\$5.2m, both routed through a US bank, it obtained approval to develop an oilfield. Statoil settled civil enforcement charges with the SEC, entered an agreement to defer criminal prosecution, and paid fines and disgorgement totalling US\$21m.

It is particularly important to appreciate that the US asserted jurisdiction over Statoil and ABB in large measure because their shares trade on US exchanges. At present, more than 450 non-US companies list shares on the New York Stock Exchange, 191 of which are European.

Each of these companies is considered an "issuer", and thus subject to the jurisdictional reach of US regulators under the FCPA or other laws. Since 2003, US regulators have brought about 20 enforcement actions against non-US companies for FCPA or securities law violations.

Using a more traditional jurisdictional basis, the US obtained guilty pleas on February 6 this year from three subsidiaries of Vetco International, a British company. Two of the three subsidiaries are UK-based, but had undertaken acts in furtherance of the FCPA violations within the United States. The companies paid a collective US\$26m in fines, the largest penalty yet.

While FCPA enforcement against individuals has not yet gained the notoriety of prosecution of the NatWest Three, extradited for their role in the Enron implosion, the SEC obtained settlements in

2006 against three UK citizens employed by ABB, none of whom resided in the US. The basis for jurisdiction was that the individuals made use of US mail or wires.

The most recent corporate FCPA settlements involved fines and disgorgement of US\$15m, US\$21m, and US\$26m – significant increases over previous years. Where it may have been tempting before to dismiss as trivial the monetary costs of an FCPA enforcement matter, such facile treatment no longer seems prudent.

Perhaps most disruptive to the executive suite is the imposition of compliance monitors. Imagine a private US lawyer serving as compliance monitor with full access to the books and records of the company, its executives and outside auditors for a period of three years, reporting back to US regulators on matters related to non-US business.

Statoil, ABB, Vetco and numerous other companies have suffered the same plight with compliance monitors required to submit quarterly reports regarding US operations to US enforcement authorities. Such appointments offer a bitter pill to swallow in order to obtain settlement of an FCPA matter.

## Challenges for European companies

European companies preserve a tradition of conducting business in emerging markets with divergent customs regarding gratuities and other payments to government officials. However, even nominal perquisites indicative of mutual respect may raise legal concerns under many anti-corruption regimes.

While many European countries have passed anti-corruption legislation within the past few years, many more developed countries are moving to abolish bribery of foreign officials. Indeed, there are 36 signatories to the 1997 OECD Convention on Combating Bribery and European enforcement actions are increasing.

Statoil settled a parallel enforcement action brought by the Norwegian government, and both Siemens and BAE Systems have been the subject of recent enforcement actions.

To address this tightening web of anti-corruption regimes, companies must tailor compliance programmes to fit both the business and the risk. While no single model for FCPA or anti-corruption compliance will work for every company, certain goals must always be pursued.

Due diligence as to intermediaries and compliance training programmes must be more than paper tigers. Senior company officials must establish and maintain a culture of compliance, so-called "tone at the top", and violations, when detected, must draw firm but fair disciplinary actions.

US enforcement authorities are reaching further overseas, aggressively expanding FCPA enforcement against both companies and individuals. European companies must understand the legal and business risks associated with the FCPA and other anti-corruption regimes, and anticipate these risks with appropriate compliance programmes.