

# No Time to Party: Key Enforcement Developments as the FCPA Turns 30

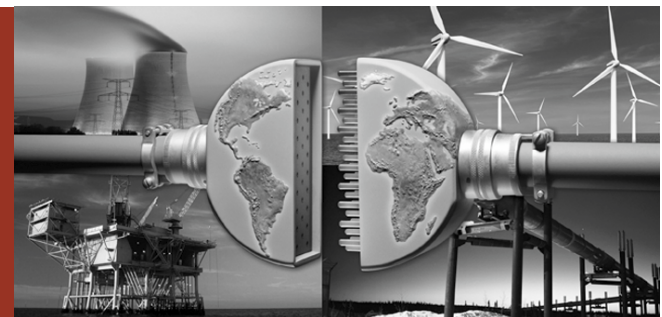
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# The FCPA Turns 30

- Key Enforcement Developments
  - 1. Record-Setting Penalties
  - 2. Global and Industry-Wide Investigations
  - 3. Individuals as Targets
  - 4. Traveling Violations (and Clarifications)
  - 5. Not-So-Facilitating Payments
  - 6. Transactional Due Diligence
  - 7. Civil Litigation Rooted in FCPA Violations

# The FCPA Turns 30

- 1. Record-Setting Penalties

- Annual DOJ and SEC Prosecutions Have Soared from 2003 to 2007: 2 to 5 to 12 to 15 to 38
- Vetco International: \$26 Million for Payments to Nigerian Customs Officials re Equipment, Personnel
- Baker Hughes: \$44 Million for Payments to Kazakh Oil Officials and to Others in Angola, Indonesia, Russia re Oilfield Services
- York International: \$22 Million for Payments in UAE and Elsewhere re HVAC Equipment
- Chevron: \$28 Million for Payments Under Iraq Oil-for-Food Program

# The FCPA Turns 30

- 2. Global and Industry-Wide Investigations
  - Single-Company but Multi-Country FCPA Violations
    - York International: Europe, Middle East, India, Nigeria, Turkey, and Others, Spanning Hundreds of Incidents
    - Paradigm: China, Indonesia, Kazakhstan, Mexico, Nigeria, Spanning Numerous Incidents
    - Textron: Bangladesh, Egypt, India, Indonesia, Iraq, UAE, Spanning Numerous Incidents

# The FCPA Turns 30

- 2. Global and Industry-Wide Investigations (contd.)
  - Orthopedic Implant Manufacturers (Biomet, Medtronic, Smith & Nephew, Stryker, Zimmer Holding)
  - Oil and Oilservice Firms Doing Business with Swiss Freight Forwarder Panalpina Welttransport Holding (Reportedly Implicated in Vetco Prosecution) (Nabors Industries, Noble Drilling, Pride, Royal Dutch Shell, Schlumberger, Transocean)
  - Participants in Iraq Oil-for-Food Program (Akzo Nobel, Chevron, El Paso, Ingersoll-Rand, Textron)

# The FCPA Turns 30

- 3. Individuals as Targets

- Of 31 FCPA Defendants in 2007, 15 Were Individuals
- Cong. William Jefferson re Nigerian Telecom Deal
- Monty Fu, Chairman of Syncor International
- Robert Philip and Si Chan Wooh, Respectively CEO and EVP of Schnitzer Steel Industries
- Charles Martin, Asian Government Affairs Director of Monsanto

# The FCPA Turns 30

- 4. Traveling Violations (and Clarifications)
  - Affirmative Defense to FCPA Anti-Bribery Provisions is that Payments were Reasonable and Bona Fide Expenditures Directly Related to Promotion or Demonstration of Goods or Services or to Performance of a Foreign Government Contract
  - Lucent Technologies: Accounting Violations for Expenditures Relating to Travel by Chinese Officials
  - Two FCPA Opinion Releases Offer Guidance on Affirmative Defense

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- 5. Not-So-Facilitating Payments
  - There is Exception to FCPA Anti-Bribery Provisions for Payments Made to Expedite or Secure Performance of “Routine Governmental Action”
  - Vetco International Payments to Nigerian Customs Officials Did Not Qualify as Facilitating Payments
  - Payments Influenced Officials to Make Discretionary Decisions in Vetco’s Favor
  - Payments Induced Governmental Action to Which Vetco was Not Entitled



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## • 6. Transactional Due Diligence

- Nearly Half of 2007 FCPA Enforcement Actions Arose in Context of Due Diligence in Mergers or Acquisitions
- Delta & Pine Land Payments in Turkey Arose During Acquisition Due Diligence by Monsanto
- York International Payments in UAE and Elsewhere Resulted in Enforcement Settlement Negotiated During Acquisition by Johnson Controls
- Due Diligence Must Include Assessment of FCPA Risk Inherent in Target's Business, Evaluation of Target's Compliance Program, Consideration of Disclosure to Enforcement Agencies, and Plan for Integration of Acquirer's and Target's Compliance Programs

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- 7. Civil Litigation Rooted in FCPA Violations
  - FCPA Has No Private Right of Action
  - Alternative Route to Damages Claims for FCPA Violations
    - RICO Suit by Dominican Republic Claiming Conspiracy to Bribe Officials to Permit Unlawful Dumping of Hazardous Waste (AES)
    - Securities Class Action Claiming Misstatements of Adequacy of Internal Controls in Light of FCPA Violations (Immucor)
    - Securities Class Action Claiming Overstatements of Income Due to Foreign Bribery (FARO Technologies)
    - Securities Derivative Suit Claiming Breach of Directors' and Officers' Fiduciary Duties for Permitting FCPA Violations (BAE Systems)

# The FCPA Turns 30

- Conclusion

- New Era of FCPA Enforcement: Higher Risks, Higher Standards, Higher Penalties
- Effective Compliance Program All the More Crucial
- Fostering a Corporate Culture of Compliance is Key Role for Board, Management, Legal Department

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