Looking Back - Some FCPA Issues from 2010

We conclude our blog this year with some of our favorite Foreign Corrupt Practices Act (FCPA) issues that have arisen or were discussed in 2010.

The following list is not exhaustive but is designed to supplement our prior posts on our top enforcement actions and investigations from 2010 with other issues we felt were of importance to the FCPA compliance and ethics practitioner.

I. Amendments to the FCPA

At what the FCPA Blog termed "an unprecedented investigation into the Department of Justice's (DOJ) enforcement of the Foreign Corrupt Practices Act (FCPA)", in a hearing on November 30, 2010 entitled the "*Examining Enforcement of the Foreign Corrupt Practices Act*" before the US Senate Judiciary Committee, Subcommittee on Crime and Drugs, three panelists, Butler University Professor Michael Koehler, and attorneys Andrew Wiessmann, of Jenner and Block and Michael Volkov, of Mayer Brown, presented proposed amendments to the FCPA.

Professor Michael Koehler (a/k/a The FCPA Professor)
Professor Koehler focused on two issues; (1) the lack of individual prosecutions; and (2) what he believes is an over-expansive definition of foreign governmental official. The DOJ's theory of prosecution was based on the claim that employees of alleged [state-owned enterprises] were "foreign officials" under the FCPA – an interpretation Professor Koehler believes is contrary to Congressional intent. Prosecuting individuals is a key to achieving deterrence in the FCPA context and should thus be a "cornerstone" of the DOJ's FCPA enforcement program. He argued that the answer is not to manufacture cases, or to prosecute individuals based on legal interpretations contrary to the intent of Congress in enacting the FCPA while at the same time failing to prosecute individuals in connection with the most egregious cases of corporate bribery.

Michael Volkov
Attorney Michael Volkov advocated the adoption of a limited amnesty program for corporate self-compliance with the FCPA. Volkov's proposal consists of the following elements:

1. Participating company agrees to conduct a full and complete review of the company's FPCA compliance program for the five previous years.
2. This internal review is to be conducted, jointly, by a major accounting firm or specialized forensic accounting firm and a law firm.
3. The company agrees to disclose the results of the legal-accounting audit to the DOJ, Securities and Exchange Commission (SEC), its investors and the public.

4. If the company discovers any FPCA violations in the audit, the Company agrees to take all steps to eliminate the violation(s) and implement appropriate controls to prevent further violations.
5. The company would subject itself to an annual review for five years to ensure that FCPA compliance was maintained.
6. The company would retain a person similar to an independent FCPA compliance monitor who would annually certify to the DOJ and SEC that the company was in FCPA compliance.
7. In exchange for this, both the DOJ and SEC would agree not to initiate any enforcement actions against a company during this period except in the situation where a FCPA violation was found and it "rose to ***flagrant*** or ***egregious*** levels."

Andrew Wiessman

Attorney Andrew Wiessmann testified about 2 of his 5 proposed amendments to the FCPA (the full five proposed amendments are set out in Whitepaper entitled "*Restoring Balance-Proposed Amendments to the Foreign Corrupt Practices Act*"). They were (1) to create a compliance defense available to a company if it has an adequate compliance program, similar to the "*adequate procedures"* defense available under the UK Bribery Act; and (2) to limit the legal doctrine of *respondeat superior* liability where a company can demonstrate that it took specific steps to prevent the offending employee's actions.

Under this proposal, Wiessmann believes that companies will increase their compliance with the FCPA because they will now have a greater incentive to do so. He envisions a defense similar to the "*adequate procedures*" defense, noted in the UK Bribery Act, where companies will be protected if a rogue employee engages in corruption and bribery despite a company's diligence in pursuing a FCPA compliance program; and lastly "it will give corporations some measure of protection from aggressive or misinformed prosecutors, who can exploit the power imbalance inherent in the current FCPA statute—which permits indictment of a corporation even for the acts of a single, low-level rogue employee—to force corporations into deferred prosecution agreements."

Most interestingly, the hearing began with the Subcommittee Chairperson, Senator Arlen Specter, questioning the DOJ's policy of obtaining large fines from corporations, rather than prosecuting individuals, to deter violation of the law. He specifically cited the example of the enforcement action against Siemens Corp., which resulted in a fine of $1.6 billion, yet had no individual prosecutions. He also pointed to the examples of BAE which paid a fine of $400 million and the Daimler Corporation which paid a fine of $185 million and subsequently there have been no individuals prosecuted from either of these corporations. Senator Specter posed the question to the DOJ representative at the hearing, Greg Andres, as to whether the imposition of fines simply was viewed by companies as a cost of doing business. Senator Specter's statements were clearly in opposite to the testimony of the three witnesses who seemed to be calling for more defenses, greater clarity and an amnesty program.

James McGrath

Another practitioner, Cleveland attorney James McGrath, also weighed in with a proposal for an amendment to respond to what he called "seismic shift in the government's perception of its role" regarding internal company FCPA investigations. Responding to Lanny Breuer's advise that when a possible FCPA violation has been discovered, a corporation should "seek the government's input on the front end of its internal investigation", McGrath proposed an amendment to the FCPA that would expressly prohibit requiring a company to immediately involve the DOJ at the outset of the internal investigation process as mandatory for receiving cooperation credit under the US Sentencing Guidelines. He argued that for those companies that do invite the government in as investigatory partners from the beginning, there should be some transactional or use immunity -- or at least some limitation on penalties and sanctions -- for other wrongs uncovered during the course of the FCPA investigation in recognition of their good-faith efforts to cooperate with the government. Such legislation amending the FCPA would protect the balance of interests in corporate criminal and civil prosecutions already struck by the US Sentencing Guidelines.

II. Bribery Act

Q: Why is a UK law on our Top FPCA issues for 2010?
A: Because it is a ***game changer.***

Passed in April 2010 and set to become effective on April 1, 2011, the UK Bribery Act represents what former DOJ prosecutor and now private practitioner Mark Mendelsohn is quoted in the Wall Street Journal to have said "is the FCPA on steroids." In the December 28, 2010 article entitled, "*U.K. Law On Bribes Has Firms In a Sweat",* reporter Dionne Searcey indicated that the Bribery Act replaces several old British statutes and codifies in one location, that country's laws against bribery in the commercial context. Although Searcey called the law's scope "murky" the UK Ministry of Justice has released preliminary guidance on a key component of the Bribery Act; what may constitute an adequate compliance program.

This is important because there is one affirmative defense listed in the Bribery Act and it is listed as the "*adequate procedures*" defense. The Explanatory Notes to the Bribery Act indicate that this narrow defense would allow a corporation to put forward credible evidence that it had adequate procedures in place to prevent persons associated from committing bribery offences. The legislation required the UK Ministry Justice to publish guidance on procedures that relevant commercial organizations can put in place to prevent bribery by persons associated with their entity. The Ministry of Justice published its guidance in September and took comments from interested parties. The final guidance is scheduled to be made available in early 2011. This guidance may well set the new worldwide *best practices* for a corporate anti-bribery and anti-corruption program.

- In addition to providing substantive guidance on what may constitute the basis for the only affirmative defense under the Bribery Act, there are several substantive differences between the FPCA and the UK Bribery Act which all companies should understand. The Bribery Act:

- has no exception for facilitation payments.
- creates strict liability of corporate offense for the failure of a corporate official to prevent bribery.
- specifically prohibits the bribery or attempted bribery of private citizens, not just governmental officials.
- not only bans the actual or attempted bribery of private citizens and public officials but all the receipt of such bribes.
- has criminal penalties of up to 10 years per offense not 5 years as under the FCPA.

The Bribery Act is a significant departure for the UK in the area of foreign anti-corruption. It cannot be emphasized too strongly that the Bribery Act is significantly stronger than the FCPA. The Bribery Act provides for two general types of offence: bribing and being bribed, and for two further specific offences of bribing a foreign public official and corporate failure to prevent bribery. All the offences apply to behavior taking place either inside the UK, or outside it provided the person has a "close connection" with the UK. A person has a "close connection" if they were at the relevant time, among other things, a British citizen, an individual ordinarily resident in the UK, or a body incorporated under the law of any part of the UK. Many internationally focused US companies have offices in the UK or employ UK citizens in their world-wide operations. This legislation could open them to prosecution in the UK under a law similar to, but stronger than, the relevant US legislation.

One positive development from the Bribery Act is that it does away with any legal question of "who is a foreign governmental official" which is often a question under the FCPA. The DOJ uses other legislation, such as the Travel Act, which can be used to ban commercial bribery generally, to back corrupt actions made to a foreign person who is not a governmental official, into an FCPA violation. The Bribery Act simply bans all commercial bribery. All US companies with UK subsidiaries or UK citizens as employees, should need to understand how this law will impact their operations and integrate the Bribery Act's *adequate procedures* into their overall compliance and ethics policies sooner rather than later.

III. FCPA Based Litigation

1. Your Dog Bit Me - Alba

As reported by the FCPA Blog, the Aluminum Bahrain BSC., known as Alba, is majority-owned by the government of Bahrain. It has filed two lawsuits against its own suppliers, alleging corruption and fraud against it by the suppliers. In the first suit, Alba sued Alcoa Inc., its long-time raw materials supplier, for corruption and fraud. The suit, in Federal court in Pittsburg, alleged that over a 15-year period Alba was overcharged $2 billion for materials. This money, according to the suit, was initially paid to overseas accounts controlled by Alcoa's agent, London-based Victor Dahdaleh, and some was then used to bribe Alba's executives in return for supply contracts. In the second suit, Alba claimed that the Japanese trading company Sojitz Corp., and its US subsidiary paid $14.8

million in bribes to two of Alba's employees in exchange for access to metals at below-market prices. Alba sought money damages in both suits. An interesting development in both suits has been that the DOJ intervened saying discovery could interfere with the governments' own investigation into potential criminal wrongdoing, including possible violations of the FCPA.

2. How Fast Can You Get to the Courthouse - SciClone

SciClone is the most recent example of a fast growing trend that occurs when some type of FCPA investigation is announced, of law firms pouncing with lawsuits claiming securities violations before the investigations are concluded. As reported by the FCPA Professor, on August 9th, SciClone announced that it had been contacted by the SEC and was advised that the SEC had initiated a formal, non-public investigation of SciClone. In connection with this investigation, the SEC had issued a subpoena to SciClone requesting a variety of documents and other information. The subpoena requested documents relating to a range of matters including interactions with regulators and government-owned entities in China; activities relating to sales in China and documents relating to certain company financial and other disclosures. On August 6th, 2010, the Company had received a letter from the DOJ indicating that it was investigating FCPA issues in the pharmaceutical industry generally, and had received information about the Company's practices suggesting possible violations. Within the week, its stock dropped over 31%. Within one week, 5 law firms announced that they were investigating the company for potential securities laws investigation and within 2 weeks, seven different law firms had filed class actions suits against the company for securities violations.

3. Don't Do as I Do, Do as I Say - Noisy Exits

This past year brought a growing trend for terminated employees to file suit claiming that they were fired for either (1) reporting allegations of conduct violative of the FCPA or (2) refusing to engage in conduct which would violate the FCPA.

A recent example of the former was reported by the FCPA Professor in a post entitled "*Yet Another Noisy Exit"*. In this matter, the former Director & Controller of Mexico of Sempra Global, Rodolfo Michelon, was terminated by the company in March 2010. He later alleged that he discovered conduct by the company in Mexico which violated the FCPA, he subsequently reported this to the company and was fired for his efforts. In a California state court suit, he claimed that "The termination of the Controller employment was not only in retaliation for Michelon's complaints, but it was also meant to keep Michelon from reporting the frauds and bribes to governmental, law enforcement officials." The Company vehemently denied these allegations, responding, as reported in the San Diego Tribune, that Michelon was a "disgruntled ex-employee attempting to cash in by making 'outlandishly false claims and misrepresentations' after being let go in a routine reorganization." The company also noted that it had investigated the allegations and found them to be "without merit."

An example of the later claim was brought by Steven Jacobs, the former President of Macau Operations for Las Vegas Sands Corp., until his termination in July 2010. In a suit against the Las Vegas Sands Corp., alleging breach of contract and tort-based causes of

action, Jacobs alleged, among other things, that he was ordered, but refused, to use improper leverage and undue influence on certain Chinese governmental officials so as to obtain favorable treatment for his employer in China. Additionally he alleged that was required "to use the legal services of a Macau attorney [...][an individual media is reporting as a member of a Chinese local government executive council] despite concerns that [the individual's] retention posed serious risks under the criminal provisions of the United States code commonly known as the Foreign Corrupt Practices Act ('FCPA')." As noted by the FCPA Professor in a blog entitled, "*Another Noisy Exit"* the company has stated, "While Las Vegas Sands normally does not comment on legal matters, we categorically deny these baseless and inflammatory allegations."

IV. Law Students Enter the FCPA Debate

Two law students blogged about law review articles, yet to be published, which greatly enhanced the FCPA world in the past year. UCLA student Kyle Sheahen, explored the issue of affirmative defenses under the FCPA in an article entitled "*I'm Not Going to Disneyland: Illusory Affirmative Defenses Under the Foreign Corrupt Practices Act*". In his paper, he sets forth his proposition that FCPA enforcement actions provide "uneven indicators or what conduct the government considers covered by the defense. Consequently, in the absence of authoritative judicial interpretation or clear regulatory guidance, corporate managers are required to make educated guesses as to whether contemplated payments will qualify as "bona fide promotional expenses."

Bruce Hinchey discussed his upcoming publication, "*Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements*," which analyzes the differences between bribes paid and penalties levied against companies that do and do not self-disclose under the FCPA. Using a regression analysis, Hinchey concluded that companies which did voluntarily self-disclose paid higher fines than companies which did not self-disclose to the DOJ. He concluded his post by noting that this evidence was contrary to the conventional wisdom that a company receives a benefit from self-disclosure and such evidence would "raise questions about whether current FCPA enforcement is fundamentally fair".

While we disagreed with some of the conclusions of both Sheahan and Hinchey, we found their contributions enhanced the FCPA discussions for the compliance practitioner. To have law students penning authoritative law review articles signals an upcoming group of lawyers who will bring a passion to the FCPA debates in the future. We wish them both well as they enter the FCPA fray as attorneys.

We appreciate the support of all readers, contributors, commentators and critics of our site, a very Happy and Safe New Year's to all. So we leave this most eventful FCPA year of 2010 and move into 2011. With all we have learned in the past year, the only thing we can say with certainty is "*more will be revealed"*.

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