Increasing International Cooperation & Other Key Trends in Anti-Corruption Investigations

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Recent developments underscore that the Foreign Corrupt Practices Act (FCPA)[1] remains a major enforcement priority in the United States, and that the Department of Justice and the Securities and Exchange Commission are having increasing success in enlisting foreign governments to pursue anti-corruption investigations, share information and cooperate in crafting joint resolutions of such investigations. In this article, we examine the chief features of this trend and offer several practical recommendations for how companies can seek to mitigate the adverse consequences of these kinds of cross-border inquiries.

In a key illustration of this trend, DOJ, in conjunction with the U.K. Serious Fraud Office (SFO), announced in February 2009 the settle-

ment of corruption charges with BAE Systems PLC, one of Europe's largest defense contractors. Pursuant to the settlement, on March 1, 2010, BAE pleaded guilty in U.S. District Court in the District of Columbia to conspiring to defraud the United States by, among other things, making false statements about its FCPA compliance program.[2] The company was ordered to pay a $400 million fine, described in DOJ's press release as "one of the largest criminal fines in the history of DOJ's ongoing effort to combat overseas corruption." Under BAE's settlement with the SFO, the company will pay a fine of £30 million—a record criminal fine for a company in the U.K.[3] The BAE settlement marks the first time that the SFO and DOJ have cooperated to jointly resolve an investigation; the SFO has called it a "ground breaking global agreement."

In another recent illustration of the growing collaborative approach to anti-corruption enforcement efforts, 22 executives and employees of 16 different companies in the military and law enforcement products industries in the U.S., the U.K. and Israel were arrested on January 18. They were charged with FCPA violations as a result of an undercover operation conducted by the FBI and DOJ, with assistance from the U.K.'s City of London Police.[4] According to the indictments, the defendants attempted to make improper payments to FBI agents posing as foreign procurement officials. The case represents the largest single investigation and prosecution in the history of DOJ's enforcement of the FCPA. It also represents the first large-scale use of undercover law enforcement techniques, previously seen only in organized crime cases, to uncover FCPA violations.

This increase in FCPA enforcement has led to an increase in private litigation as well. Although there is no private right of action under the FCPA, the allegations underlying an FCPA enforcement action may form the basis for other causes of action. Several companies that have recently been targeted by government regulators and prosecutors have been forced to defend shareholder class actions or derivative suits arising from the same set of facts. For example, on December 4, 2009, an action was brought against Siemens AG by a class of shareholders in the Eastern District of New York. The complaint alleged that Siemens committed securities fraud by making false statements to the effect that the company would remain profitable after it was forced to end its pattern of making unlawful bribes in violation of the FCPA.[5] Similarly, in October 2009, a derivative complaint was filed in Texas on behalf of Pride International Inc. claiming breach of fiduciary duty. The complaint alleged that "Pride repeatedly violated the [FCPA] through its business operations in numerous countries," and that certain former officers and directors of the company were made aware of the violations but failed to take action to correct or prevent the misconduct.[6] The failure to detect and prevent international bribery may also form the basis of claims against directors even where no FCPA charges have been brought.[7]

These developments reflect substantial changes in anti-corruption enforcement priorities and techniques that are important for all businesses with international operations to understand. In this article, we first discuss three significant developments: (i) the increase in international cooperation in anti-corruption investigations; (ii) the increased focus on the prosecution of individuals in addition to business entities; and (iii) the government's use of more aggressive investigative techniques in white collar cases. We then conclude with some practical recommendations for anticipating and mitigating the potential adverse consequences of such cases.

Increased Law-Enforcement Cooperation Across Borders

Companies with significant international operations are more likely than ever, if an issue arises, to face criminal and regulatory investigations on multiple fronts. Prosecutors and regulators from different countries are increasingly working together to share the investigatory labor and the resulting fines and penalties. Richard Alderman, Director of the SFO, noted in a recent speech that:

> **One area that you will not yet have seen in the public domain, but where I hope you will see some progress soon concerns global settlements. Our guide set out our**

> **aspirations to reach global settlements where the company wants this. In practical terms this will usually be a settlement involving the SFO, the DOJ and sometimes the SEC. Our relationship with the DOJ and with the SEC is excellent. …*There is almost daily contact between the SFO, the DOJ and the SEC.***
>
> **We share information about cases. If, for example, you come and see me about a case I shall want to know what you have done about any FCPA exposure. *I know that my US colleagues will want to know what you are doing about coming to the SFO.***
>
> **We have a number of cases where we are looking at global settlements with the US. I hope that we will be able to make some announcements soon. This will show that our commitment to global resolutions is very real and that we are delivering on this.[8]**

In the SFO's Guide, which was issued last year and detailed procedures for self-reporting by overseas corporations, the SFO made clear that it expects to work hand-in-hand with U.S. enforcement officials. The Guide provides that, in considering whether voluntary disclosure will result in leniency, "the timing of an approach to the U.S. Department of Justice is also relevant. If the case is also within our jurisdiction we would expect to be notified at the same time as the DOJ."[9] In keeping with this trend, DOJ acknowledged in its announcement of BAE's guilty plea the U.S.'s "appreciation of the significant assistance provided by the U.K.'s Serious Fraud Office" and further expressed its "gratitude to that office for its ongoing partnership in the fight against overseas corruption."[10]

U.S. prosecutors also have indicated they intend to pressure other foreign counterparts to prosecute companies and executives in their own jurisdictions. Lanny Breuer, Assistant Attorney General for DOJ's Criminal Division, has stressed that DOJ "will press for ever-increasing vigilance by our foreign counterparts to prosecute companies and executives in their own countries for foreign bribery—both through the OECD (Organization for Economic Cooperation and Development) and less formal means."[11]

BAE Systems is but the latest example of such coordinated global settlements. In 2008, the DOJ and SEC similarly worked together with German prosecutors to jointly resolve a criminal case against Siemens AG in which Siemens paid a criminal fine to the U.S. of $450 million, and disgorgement of $350 million to the SEC.[12] German prosecutors imposed an additional $395 million fine, and also required disgorgement, resulting in a total settlement amount of more than $1.6 billion, the largest amount any company has ever paid to resolve international corruption charges. In announcing the Siemens settlement, Acting Assistant Attorney General Matthew Friedrich stressed that U.S. prosecutors are now "working with our foreign law enforcement colleagues in bribery investigations to a degree that we never have previously."[13]

Other countries are becoming more active in their investigation of global corruption. With the recent addition of Israel, 38 countries have now signed the anti-bribery convention of the OECD.[14] In a 2009 Progress Report by Transparency International regarding enforcement of the OECD convention, three countries in addition to the United States—Germany, Norway and Switzerland—were identified as actively pursuing anti-corruption cases. Germany alone is listed as having over 150 ongoing foreign bribery investigations.[15] An additional 11 countries were credited with moderate foreign anti-bribery enforcement. The prosecution of Mabey & Johnson Ltd. in September 2009 represented the first conviction in the U.K. of a company for overseas corruption.[16]

On December 9, 2009, the OECD released a new Recommendation for Further Combating Bribery of Foreign Public Officials in order to enhance the ability of the 38 signatory countries to prevent, detect and investigate allegations of foreign bribery. Among other things, the Recommendation calls on those countries to:

Improve cooperation between countries for the sharing of information and evidence in foreign bribery investigations and prosecutions and the seizure, confiscation and recovery of the proceeds of transnational bribery, through, for instance improved or new agreements between the States Parties for these purposes;

Provide effective channels for public officials to report suspected foreign bribery internally within the public service and externally to the law enforcement authorities, and for protecting whistleblowers from retaliation.[17]

New guidance was issued on March 3 by the OECD Working Group on Bribery on internal controls, ethics and compliance to assist member countries in implementing anti-bribery strategies.[18]

U.S. lawmakers also have begun considering giving U.S. corporations the opportunity to initiate their own suits. On April 28, 2009, the Foreign Business Bribery Prohibition Act of 2009 was introduced in the House of Representatives.[19] The bill would create a private right of action permitting companies subject to the FCPA to sue foreign entities not subject to the FCPA for actions that would constitute FCPA violations if the jurisdictional element were satisfied. Thus, if a U.S. company lost business because a foreign company bribed a government official, the U.S. company would be permitted to sue the foreign company for damages. No action has been taken since the bill was referred to the Subcommittee on Crime, Terrorism and Homeland Security in June 2009.

Increased Prosecution of Individuals

Individuals are increasingly being targeted by both U.S. and foreign prosecutors and regulators. This trend suggests that U.S. authorities believe individual cases will help underscore the expectation that senior managers will act to prevent and detect violations. Indeed, Assistant Attorney General Breuer stressed in a recent speech that the arrest of 22 individuals in a sting operation illustrated a "cornerstone of [DOJ's] FCPA enforcement policy: the aggressive prosecution of individuals."[20] As he explained, "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."[21] SFO Director Alderman also noted recently that he did not believe there would be many prosecutions at the corporate level, and further explained that, in assessing whether to charge a corporation, it is necessary to "take into account the question of who we are really punishing. Who bears the pain if there has been a wholesale change within the corporate and the individuals concerned have all left?"[22]

The SEC similarly made clear in a case against Nature's Sunshine Products Inc. that holding individuals accountable was part of its enforcement strategy.[23] The company settled charges relating to alleged violations of the FCPA by a foreign subsidiary. The complaint alleged that former employees of the subsidiary made several unlawful payments and that the COO and former CFO failed adequately to supervise the relevant personnel. There were no allegations, however, that the individual defendants had participated in or even had direct knowledge of any improper conduct. Rather, the SEC charged the company's former COO and CFO with FCPA violations as "controlling persons" under the securities laws.[24] The case appears to be the first time that the SEC has charged corporate executives for FCPA violations based solely on the fact that they had supervisory authority over those who committed the primary violations.

New Aggressive Enforcement Techniques

Finally, the use of undercover agents in an FCPA "sting" operation reflects federal prosecutors' increasing willingness to use aggressive investigative techniques in white collar cases and represents the first large-scale use of undercover law enforcement techniques to uncover FCPA violations. In addition to using an FBI agent to pose as a foreign sales agent purportedly representing

the minister of defense for an African country, the investigation involved approximately 150 FBI agents executing 14 search warrants across the country, with the City of London Police executing an additional seven search warrants. The approach was similar to that used in the Galleon insider trading investigation announced on November 5, 2009,[25] where prosecutors relied upon court-authorized wiretaps on various telephones and consensually recorded conversations between cooperating sources and others—techniques used for the first time in a Wall Street insider trading context. The government's ability to employ these kinds of investigatory tactics in connection with cases outside of the organized crime arena will make it easier for federal prosecutors to establish previously hard-to-prove elements of these cases, and decrease the government's need to rely on whistleblowers who come forward after the fact. Assistant A.G. Breuer emphasized that taken together, the FCPA sting operation and the Galleon insider trading investigation represent a new chapter in white collar criminal enforcement: "Out are the days of resting easy in the belief that only self-reporting or tipsters will bring criminality to light. In are the days of proactive and innovative white collar enforcement."[26]

The Value of Self-Detection and Reporting

These recent developments underscore how critical it can be to have adequate compliance systems in place so that any possible wrongdoing comes to management's attention as quickly as possible, permitting companies to react promptly and appropriately to credible warning signs of improper payments. Such self-detection and self-reporting is often the most effective step a company can take to mitigate the adverse consequences of a full-fledged cross-border investigation.

For example, in a recently settled FCPA enforcement action against NATCO Group, Inc., the SEC specified that the relatively small civil penalty assessed against the company was due, in large part, to the company's cooperation and remedial efforts.[27] The Order specified the steps taken by the company that the SEC considered to be significant, including that NATCO discovered the payments itself during a routine internal audit review, conducted an internal investigation, self-reported to the SEC, undertook numerous remedial measures, and enhanced its monitoring and audit process for its compliance programs.

In another example of the importance of anti-corruption compliance efforts, the Delaware Chancery Court recently dismissed derivative claims against Dow Chemical directors alleging that they failed to detect and prevent overseas bribery. The Court assumed that bribery had occurred but stressed that:

> **Plaintiffs cannot meet their burden here for another reason. The Dow board has set up policies to prevent improper dealing with third parties. In particular, Dow's Code of Ethics expressly prohibits any unethical payments to third parties. Moreover, plaintiffs' own complaint once again belies their argument. Contained within Count II's litany of alleged breaches of fiduciary duty plaintiffs implicitly acknowledge Dow's "corporate governance procedures." …Plaintiffs cannot simultaneously argue that the Dow board "utterly failed" to meet its oversight duties yet had "corporate governance procedures" in place without alleging that the board deliberately failed to monitor its ethics policy or its internal procedures.[28]**

Assistant A.G. Breuer has similarly emphasized that "every company should have a rigorous FCPA policy that is faithfully enforced," that companies that discover potential FCPA issues should fully investigate and take action to address them,[29] and that in such instances, DOJ will "meaningfully reward" voluntary disclosure and that companies will receive "meaningful credit" for disclosure and cooperation.[30] In recognition of such cooperation, DOJ recently allowed two companies settling FCPA investigations to employ a self-monitoring mechanism, rather than having a court-appointed monitor. On July 30, 2009, Helmerich & Payne, Inc. settled FCPA books-and-records and internal control charges with DOJ and the SEC that arose out of alleged unlawful payments to customs offi-

cials in Argentina.[31] The company discovered these payments on its own, conducted an internal investigation and voluntarily reported the results to DOJ and the SEC. DOJ's press release acknowledged the company's "voluntary disclosure and thorough self-investigation of the underlying conduct," as well as the cooperation provided to DOJ and the company's extensive remedial efforts. Similarly, on December 31, 2009, UT Starcom, Inc. settled FCPA charges arising out of its operations in China, Mongolia and Thailand.[32] Unlike many recent resolutions, the non-prosecution agreements negotiated in both of these cases permit the companies to self-monitor and report on the implementation of their compliance policies without requiring the oversight of an external compliance monitor.

Despite these incentives to cooperate, companies also must learn to navigate among the sometimes competing demands of U.S. and foreign government investigations during parallel cross-border inquiries. Providing "cooperation" is not always a simple solution. In this regard, the OECD's Anti-Bribery Convention, which sets forth standards for anti-corruption legislation among its signatory countries, anticipates the possible conflicts posed by competing jurisdictional claims. Article 4.1 states that each party shall "take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory."[33] However, Article 4.3 provides that "[w]hen more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution."[34] This provision, which appears to have drawn limited attention to date, may turn out to be useful to companies seeking to manage competing claims of international enforcement agencies. It may be helpful, for example, to invoke Article 4.3 at the outset of a cross-border inquiry to force competing country investigations to coordinate their efforts and designate one country as the lead investigator and principal point of contact for the company.

Conclusion

As these recent developments suggest, maneuvering adroitly through international anti-corruption investigations is complex and challenging. The stakes for companies have never been higher and governments have committed unprecedented resources to conducting cross-border investigations. Thus, it has never been more important for companies to take affirmative steps to ensure that they have established an effective anti-corruption compliance infrastructure, set an appropriate tone at the top to reinforce senior management's commitment to compliance, and given employees and supervisors adequate tools to understand and comply with applicable rules and regulations.

NOTES

1. 15 U.S.C.A. §78dd-1 *et seq.* The FCPA prohibits U.S. persons and companies, and foreign persons and companies acting in the U.S., from bribing government officials for the purpose of obtaining or retaining business.
2. *See* DOJ Press Release, *BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine* (March 1, 2010).
3. SFO Press Release, *BAE Systems PLC* (Feb. 5, 2010). It has been reported, however, that on March 2, 2010, a British court delayed final approval of the agreement until the court can review the objections of two anti-corruption groups who are asserting, among other things, that the plea deal does not reflect the severity of the misconduct. *See British Court Blocks BAE Plea Deal*, Compliance Week (March 3, 2010).
4. DOJ Press Release, *Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme* (Jan. 19, 2010).
5. *See* Complaint, *Johnson v. Siemens AG*, CV 09-5310 (E.D.N.Y. Dec. 4, 2009).
6. *Arnold* v. *Bragg*, Verified Shareholder Derivative Petition, No. 2009-66082 (Oct. 14, 2009).
7. *See, e.g., In re Dow Chemical Co. Derivative Litigation*, 2010 WL 66769 (Del. Ch. 2010).
8. Richard Alderman, *The SFO and DOJ 'Special Relationship': The future of UK/US co-operation against overseas corruption and other crimes*, Arnold & Porter (UK) LLP: Panel Discussion (Dec. 9, 2009) (emphasis added).
9. Approach of the Serious Fraud Office to Dealing with Overseas Corruption (July 21, 2009).
10. *See* DOJ Press Release, *BAE Systems* (March 1, 2010).

11. Lanny A. Breuer, Assistant Attorney General, Criminal Division, *Prepared Address to the 22nd National Forum on the Foreign Corrupt Practices Act* (Nov. 17, 2009).
12. DOJ Press Release, *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines* (Dec. 15, 2008).
13. DOJ Release, *Transcript of Press Conference Announcing Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations* (Dec. 15, 2008).
14. OECD's Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions www.oecd.org/document/0,3343, en_2649_34859_2017813_1_1_1_1,00.html.
15. Fritz Heimann & Gillian Dell, *Progress Report 2009: Enforcement of the OECD's Anti-Bribery Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Transparency International* (June 23, 2009).
16. SFO Press Release, *Mabey & Johnson Ltd Sentencing* (Sept. 25, 2009).
17. OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Nov. 26, 2009) (emphasis in original).
18. News Release, *OECD calls on Businesses to Step Up Their Fight Against Bribery*, OECD Working Group (March 3, 2010).
19. Foreign Business Bribery Prohibition Act of 2009, H.R. 2152 (April 28, 2009).
20. Breuer, at the American Bar Association National Institute on White Collar Crime (Feb. 25, 2010).
21. Breuer, at the American Bar Association National Institute on White Collar Crime (Feb. 25, 2010).
22. Alderman, *The SFO and DOJ 'Special Relationship'* (Dec. 9, 2009).
23. *SEC* v. *Nature's Sunshine Products, Inc.*, SEC Litigation Release No. 21162 (July 31, 2009).
24. *See* 15 U.S.C.A. § 78t(a).
25. United States Attorney, Southern District of New York Press Release, *Manhattan U.S. Attorney Charges 14 Defendants With More Than $20 Million in Insider Trading* (Nov. 5, 2009).
26. Breuer, Remarks at the American Bar Association National Institute on White Collar Crime (Feb. 25, 2010).
27. *SEC* v. *NATCO Group, Inc.*, SEC Litigation Release No. 21374 (Jan. 11, 2010).
28. *See, e.g., In re Dow Chemical Co. Derivative Litigation*, 2010 WL 66769 (Del. Ch. 2010).
29. Breuer, *Prepared Keynote Address to the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum* (Nov. 12, 2009).
30. Breuer, Remarks at the American Bar Association National Institute on White Collar Crime (Feb. 25, 2010).
31. DOJ Press Release, *Hemerich & Payne Agrees to Pay $1 Million Penalty to Resolve Allegations of Foreign Bribery in South America* (July 30, 2009).
32. DOJ Press Release, UTStarcom Inc. Agrees to Pay $1.5 Million Penalty for Acts of Foreign Bribery in China (Dec. 31, 2009).
33. OECD's Convention on Combating Bribery of Foreign Officials in International Business Transaction, art. 4 (Dec. 17, 1997).
34. OECD's Convention on Combating Bribery of Foreign Officials in International Business Transaction, art. 4 (Dec. 17, 1997).

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