Navigating the Foreign Corrupt Practices Act: The Increasing Cost of Overseas Bribery

by Robert C. Blume and J. Taylor McConkie

As law enforcement increases its efforts to combat foreign bribery and enforce the Foreign Corrupt Practices Act, companies doing business overseas must educate themselves about this recent trend. This article provides an overview of the FCPA and discusses several recent cases that evidence the trend of increasing enforcement activity.

Enforcement activity under the Foreign Corrupt Practices Act (FCPA or Act)[1] has increased in recent years as the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) have devoted more attention and resources to FCPA enforcement. This article provides an overview of the FCPA, including its background and key provisions. It also discusses penalties and several recent cases.

FCPA Background

In 1977, in the wake of the Watergate scandal, Congress passed the FCPA to combat the spread of corruption overseas. The FCPA was the first anti-bribery statute of its kind in the world, though it was a largely symbolic exercise at first. During the first twenty years of the statute's existence, the DOJ brought only thirty cases under the FCPA. The SEC, which also has jurisdiction to enforce the Act, brought only three enforcement actions during that same period. The lack of enforcement of the statute during those years left observers thinking the FCPA was little more than a "legal sleeping dog."[2]

In recent years, however, the FCPA has found new prominence as the DOJ and SEC have dramatically increased the number of FCPA enforcement actions and the severity of the penalties imposed for FCPA violations. According to one report, twenty-two new FCPA investigations were launched in 2004 and 2005,[3] and 2006 was one of the busiest years on record for FCPA enforcement actions.

DOJ officials have made it known that greater attention and resources are being devoted to FCPA enforcement. For example, the deputy chief of DOJ's fraud section has announced that prosecutors will be concentrating on FCPA violators, stating that "the DOJ is likely to hike the number of individuals it will prosecute under the FCPA in the coming year," and that the DOJ is currently "ramping up hiring efforts to boost the number of attorneys specializing in FCPA issues."[4] Similarly, Assistant Attorney General Alice Fisher recently stated that the FCPA is a high priority:

> Do we care about the FCPA? Is the FCPA relevant in today's global business climate? Is enforcing the FCPA a high priority? The answer to all of those questions is yes. Prosecuting corruption of all kinds is a high priority for the Justice Department and for me as head of the Criminal Division. That includes public corruption, corruption in the procurement process, and the Foreign Corrupt Practices Act.[5]

Thus, it is critical that U.S. companies doing business overseas understand and follow the requirements of the FCPA; however, many U.S. companies are blasé about compliance. One recent study found that 42 percent of large companies surveyed had no anti-fraud policy.[6] Because of the increased enforcement and penalties, it is critical for Colorado lawyers who represent clients doing business abroad to be aware of their clients' obligations and exposures under this increasingly important legislation.

Anti-Bribery Provisions

The FCPA prohibits bribery of foreign government officials in overseas business dealings. A violation of the FCPA's anti-bribery provisions occurs when the following elements are met:

- an "issuer," "domestic concern," or any other person while in the territory of the United States,
- makes use of the mails or any other means of interstate commerce,
- corruptly,

Article Editor:

Morris Hoffman, judge for the Second Judicial District Court, Denver

About the Authors:

Robert C. Blume is a partner with Gibson, Dunn & Crutcher LLP's Denver office—(303) 298-5758, rblume@gibsondunn.com. J. Taylor McConkie is an associate with the same office—(303) 298-5795, tmcconkie@gibsondunn.com.

Criminal Law articles are sponsored by the CBA Criminal Law Section and generally are written by prosecutors, defense lawyers, and judges to provide information about case law, legislation, and advocacy affecting the prosecution, defense, and administration of criminal cases in Colorado state and federal courts.

- to offer, pay, promise to pay, or authorize the payment of money or anything of value,
- to any (a) "foreign official," (b) foreign political party or candidate for foreign political office, or (c) any person while "knowing" that some portion of the payment will be passed to any one of the above,
- for the purpose of (a) influencing any act or decision of such foreign official, (b) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, (c) securing any improper advantage, or (d) inducing such foreign official to use his influence with a foreign government or instrumentality thereof or affect or influence any act or decision,
- to obtain, retain, or direct business to, any person.[7]

Who is Covered by the FCPA

The anti-bribery provisions apply to three categories of persons or entities: "issuers," "domestic concerns," and "any person" who violates the Act "while in the territory of the United States."[8] The term "issuers" is defined by the Act as any entity that has a class of securities registered pursuant to Section 13 of the Securities Exchange Act of 1934 (Exchange Act), or that is required to file SEC reports pursuant to Section 15(b) of the Exchange Act.[9] The term "domestic concern" is broader, referring to any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that has its principal place of business in the United States or is organized under the laws of any state or U.S. territory.[10]

The terms "issuer" and "domestic concern" also include any officer, director, employee, or agent of the issuer or domestic concern, or any shareholder acting on behalf of the issuer or domestic concern.[11] Significantly, persons or entities falling under these first two categories can be liable for FCPA violations for conduct that occurs solely outside the United States.

The third category encompasses non-U.S. nationals and corporations with no formal ties to the United States. As long as some act in furtherance of an FCPA violation occurs within the United States, the person or entity committing such act will be subject to the jurisdiction of the U.S. courts. Although FCPA cases based on this third category are rare, they are not without precedent.[12]

When a Payment or Offer of Payment is "Corrupt"

The FCPA prohibits only a payment or offer of payment that is made "corruptly." The legislative history explains that "corruptly" means "evil motive or purpose, an intent to wrongfully influence the recipient."[13] Thus, like the domestic bribery statute,[14] the FCPA prohibits only a payment or offer of payment that is made to induce the recipient to misuse his or her official position. Because the statute focuses on corrupt intent, it is irrelevant whether the intended recipient of the payment actually has the ability or wherewithal to influence an official decision. Further, as long as the inducer has corrupt intent, an FCPA violation occurs where the inducer offers or promises a payment; it is irrelevant whether the payment actually is made.

Foreign Officials

Perhaps one of the most troublesome areas of FCPA compliance is determining who fits the definition of a "foreign official." The FCPA broadly defines the term "foreign official" to include:

> any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.[15]

The terms "officer," "employee," and "instrumentality" are not defined in the Act, and government agencies charged with enforcing the FCPA have offered no formal guidance on who is considered a foreign official. The only guidance on this issue comes from a review of DOJ and SEC enforcement actions. As illustrated by the cases summarized below, the DOJ and SEC have broadly interpreted the phrase "foreign official." Lawyers therefore should counsel their clients to presume the term has the broadest meaning possible, and to resolve all doubts in favor of coverage.

In the obvious case, the FCPA covers payments to heads of state or employees working directly for a foreign government.[16] The statute also covers payments to decision-makers of commercial enterprises in state-owned entities,[17] and even payments to an individual with "close ties" to a government, who maintains some government decision-making authority.[18]

The FCPA also prohibits corrupt payments to "foreign political parties." This prohibition applies to officials of a foreign political party and the party's candidates for public office.[19] Moreover, in 1998, Congress amended the FCPA and expanded the definition of "foreign official" to include:

> any officer or employee . . . of a public international organization, or any person acting in an official capacity for or on behalf of any such . . . public international organization.

As a result of this amendment, corrupt payments to officers and employees of public international organizations are prohibited by the FCPA's anti-bribery provisions. Public international organizations covered by the FCPA include, among others: the United Nations, International Monetary Fund, World Bank, African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, International Maritime Organizations, International Bank for Reconstruction and Development, International Finance Corporation, Multilateral Investment Guarantee Organization, Organization for African Unity, and the Organization of American States.[20]

Payments to Intermediaries

The FCPA also prohibits payments to any person while knowing that all or any portion of such money will be offered, given, or promised, directly or indirectly, to any foreign official.[21] Frequently, FCPA violations arise when a covered person knowingly makes a payment to an intermediary, such as a joint venture partner, consultant, or third-party agent, who then passes the money on to a foreign official. In this context, "knowing" means that the covered person is aware that the intermediary will engage in prohibited conduct, that circumstances exist such that a violation is "substantially certain," or that the covered person has a "firm belief" that a violation is likely to occur.[22]

A covered person or entity will not be shielded from FCPA liability if red flags indicating that money paid to an intermediary may be used to bribe foreign officials are ignored. As the legislative history notes, Congress intended to prohibit actions that "demonstrate evidence of a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to a high probability of violations of the Act."[23]

High-Risk Countries and Red Flags

To avoid liability under the FCPA, companies should be aware of certain red flags that raise warning signs of potentially violative activity. First and foremost, the company should consider the foreign country in which it seeks to do business. It is well known that some countries and regions of the world present a high risk of bribery and other forms of corruption. There are organizations, such as Transparency International, that periodically rank the world's most corrupt governments.[24]

In addition to the usual list countries with developing and transitional economies, China increasingly is seen as a problem area for FCPA violations. Most Chinese companies are government-owned or controlled or are instrumentalities of the government. Only a small percentage of Chinese businesses have been totally privatized. Thus, for purposes of the FCPA, it is nearly impossible for U.S. companies to conduct meaningful business in China without dealing with a foreign official. At the same time, U.S. companies are seeking business opportunities in China at unprecedented rates. Due to these converging trends, U.S. companies often ana-

lyze every Chinese transaction as if it is a transaction with a government entity.

The DOJ has identified other red flags associated with the use of intermediaries.[25] For example, companies should be on the lookout for unusual payment patterns or financial arrangements, a refusal by the intermediary to provide a certification that it will not take any action in furtherance of an unlawful bribe, unusually high commissions, lack of transparency in expenses and accounting records, apparent lack of qualifications or resources on the part of the intermediary to perform the services offered, and whether the intermediary has been recommended by an official of the potential governmental customer.

Exception and Affirmative Defenses

All payments to foreign officials do not violate the FCPA. The anti-bribery provisions of the statute contain one exception and two affirmative defenses.

Exception

The sole exception is for "facilitating or expediting payments" to government officials who perform "routine governmental action." Such facilitating payments, sometimes (problematically) called "grease payments," can be made by covered persons to foreign officials to expedite the processing of permits, licenses, or other routine documentation.[26] Such payments do not result in an FCPA violation.

"Routine governmental action" refers to actions that ordinarily and commonly are performed by the foreign official and do not entail any decision making or discretion. They are, in other words, actions the official is legally bound to take based on his or her job description. Examples of routine governmental action include the following:

- obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country
- processing governmental papers, such as visas and work orders
- providing police protection, mail pickup and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country
- providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration
- actions of a similar nature.[27]

As an "exception" to the FCPA, the government needs to prove that the payment at issue is not a facilitating payment.

Affirmative Defenses

The affirmative defenses, on the other hand, require proof by the company. The first affirmative defense applies where the payment at issue "was lawful under the written laws and regulations of the foreign official's . . . country."[28] For this defense to apply, there must be a written law in the foreign country permitting the conduct. Companies should note that a common practice or widely accepted conduct is not sufficient and will not satisfy this requirement. Because foreign countries generally do not have written laws permitting payments to government officials, this defense rarely succeeds.

The second affirmative defense, for payments that are "reasonable and *bona fide* expenditures," applies more often and has a greater likelihood of success. Examples of *bona fide* expenditures include lodging and travel expenses made to reimburse the foreign official for expenses directly associated with business-related visits to the U.S. company for specific product demonstrations or tours of company facilities or in connection with the execution or performance of contracts with the foreign government.[29]

Personal gifts masquerading as business expenditures will not qualify for this defense. Rather, the defense covers payments such as travel and lodging expenses, as well as small samples of the company's products. For example, the DOJ authorized a U.S. company to reimburse an official from Singapore for his travel-related expenses in the United States. The Singapore official incurred the expenses to attend site inspections, product demonstrations, and meetings in connection with potential business between the U.S. company and the government of Singapore.[30]

Accounting Provisions

In addition to the anti-bribery provisions, the FCPA contains two accounting provisions regulating the conduct of issuers.[31] These accounting provisions are more limited in scope than the anti-bribery provisions, as they apply only to issuers. However, they significantly impact U.S. companies.

Unlike the anti-bribery provisions, which apply only to overseas transactions involving bribery to foreign officials, the accounting provisions apply without regard to whether foreign conduct, foreign officials, or improper payments are involved. The accounting provisions apply to all of the issuer's domestic and foreign operations, creating affirmative duties for the issuer to maintain its books, records, and internal controls in such a state as to prevent the occurrence of overseas bribery. The accounting provisions are designed to ensure that shareholders receive an accurate picture of the company's expenditures.

In addition to the issuer's domestic and foreign operations, the accounting provisions also extend to the issuer's majority-owned foreign subsidiaries. Where the issuer owns less than a majority of a foreign subsidiary's stock, it must make a good faith effort to cause compliance with the accounting provisions.[32]

Books and Records Provision

The "books and records" provision requires issuers to make and keep books, records, and accounts that, in reasonable detail, accurately and fairly reflect the issuer's transactions and dispositions of assets.[33] The books and records provision thus encourages issuers to keep detailed records to prevent off-the-books transactions that would violate the Act's anti-bribery provisions. "Reasonable detail," as defined by the Act, means "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."[34] Unlike the federal securities laws, the books and records provision applies to all payments, not only to those sums that would be deemed material under traditional definitions of materiality.

Internal Accounting and Controls

This provision requires issuers to devise and maintain a system of internal controls sufficient to provide "reasonable assurances" that:

1) transactions are executed in accordance with management's general or specific authorization;

2) transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and to maintain accountability for such assets;
3) access to assets is permitted only in accordance with management's general or specific authorization; and
4) the recorded accountability for assets is compared with the existing assets at reasonable intervals, and appropriate action is taken with respect to any differences.[35]

Boards of directors, officers, and shareholders of an issuer that incorporates these internal controls are likely to detect and therefore prevent the improper dissipation of corporate assets through overseas bribery. Thus, like the books and records provision, this provision is designed to ensure corporate accountability. As defined by the Act, "reasonable assurances" of management's internal controls means "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."[36]

Penalties

Violations of the FCPA can result in severe criminal and civil penalties. On the criminal side, a violation of the FCPA's anti-bribery provisions can result in criminal fines of up to $2 million for entities, and $100,000 and/or imprisonment for up to five years for individuals.[37] Alternatively, if the violation results in pecuniary gain or loss for any person, a statutory maximum fine equal to the greater of twice the gross gain or loss is authorized.[38] Willful violations of the Act's accounting provisions can result in more severe penalties: criminal fines of up to $25 million for entities, and $5 million and/or imprisonment for up to twenty years for individuals.[39]

As for civil penalties, violations of the anti-bribery provisions can result in fines of up to $10,000 per violation.[40] For violations of the accounting provisions, the SEC may order an accounting or disgorgement, issue a cease-and-desist order, or impose penalties of up to $500,000 for entities and up to $100,000 for individuals.[41]

Illustrative Cases

There has been a sharp increase in the number and size of FCPA prosecutions in recent years, as well as unprecedented penalties for the violators. The following cases illustrate this upward trend. Although this discussion is not exhaustive, these cases have been selected because they illustrate specific aspects of the FCPA regime that counsel should be aware of when advising clients.

Baker Hughes, Inc.

On April 26, 2007, the SEC and DOJ announced that they had reached settlements with Baker Hughes, Inc. (Baker Hughes) and its wholly owned subsidiary, Baker Hughes Services International, Inc. (Baker Hughes Services).[42] The parallel settlements resolved the government's investigations into Baker Hughes's operations in Kazakhstan, Angola, Nigeria, Indonesia, Russia, and Uzbekistan.

In the SEC action, Baker Hughes agreed to pay approximately $23 million in disgorgement and prejudgment interest. Baker

Hughes also agreed to a $10 million civil penalty for violating a 2001 SEC cease-and-desist order prohibiting violations of the FCPA's books and records and internal control provisions. Under the terms of the final judgment, Baker Hughes also must retain an independent consultant to review the company's FCPA compliance and procedures.

In the DOJ action, Baker Hughes Services pled guilty to violating the FCPA's anti-bribery provisions, aiding and abetting the falsification of Baker Hughes' books and records, and conspiracy to violate the FCPA. Baker Hughes Services agreed to an $11 million criminal fine, and Baker Hughes entered into a deferred prosecution agreement whereby the company must retain a compliance monitor for a three-year period.

Facts and background. The primary allegations in this case involve the improper use of agents. The SEC's complaint alleged that Baker Hughes paid approximately $5.2 million to two agents operating in Kazakhstan, and that the company made these alleged payments while knowing that some or all of the money was intended to bribe officials of Kazakhstan's state-owned oil companies. Regarding the first agent, the SEC alleged that Baker Hughes retained the agent only after Kazakhoil, the state-owned oil company, demanded that this particular agent be retained. Baker Hughes allegedly was told that unless the agent was retained, Baker Hughes could "say goodbye to this and future business."

After Baker Hughes retained the agent, the company was awarded a lucrative oil services contract that generated more than $219 million. Although Baker Hughes (through its subsidiary Baker Hughes Services) paid the agent $4.1 million, the agent performed no identifiable services.

Regarding the second agent, the SEC alleged that Baker Hughes retained the agent despite knowing that the agent's representative was a high-ranking official in KazTransOil, the state-owned oil transportation operator in Kazakhstan. Baker Hughes paid approximately $1 million to the agent's Swiss bank account.

Practical lessons. This case illustrates several important aspects of FCPA compliance, such as the importance of recognizing red flags associated with third-party intermediaries. However, the most significant warning is the sheer size of the sanctions. The combined $44 million in fines and penalties represents the largest sanction ever imposed in an FCPA case.

Vetco International Ltd. Subsidiaries

On February 6, 2007, three wholly owned subsidiaries of Vetco International Ltd. (Vetco) pled guilty to violating the FCPA's anti-bribery provisions.[43] The three subsidiaries—Vetco Gray Controls, Inc., based in Houston, Texas; Vetco Gray UK Limited, based in Aberdeen, Scotland; and Vetco Gray Controls Limited, based in Nailsea, England (Vetco Subsidiaries)—agreed to pay criminal fines of $6 million, $8 million, and $12 million, respectively, for a total of $26 million. The plea agreements also required the Vetco Subsidiaries to hire an independent compliance monitor to oversee the formation and maintenance of a robust FCPA compliance program. Additionally, Aibel Group Ltd., another wholly owned subsidiary of Vetco, simultaneously entered into a deferred prose-

cution agreement with the DOJ based on the same underlying conduct.

Facts and background. As set forth in the plea agreements, the Vetco Subsidiaries engaged in a scheme to authorize corrupt payments to officials in the Nigerian Customs Service. Beginning in 2001, Vetco Gray UK began providing engineering and construction services for a deepwater drilling project in Nigeria. Other Vetco subsidiaries, including Vetco Gray Controls, Inc.; Gray Controls Ltd.; and Aibel Group Ltd., also participated in the project. Over a two-year period, the Vetco Subsidiaries made at least 378 corrupt payments totaling approximately $2.1 million to customs officials in Nigeria. These payments were made through an international freight forwarding and customs clearance company. According to the plea agreements, the purpose of the payments was to gain preferential treatment in the customs clearance process and to secure improper advantage with respect to the importation of goods and equipment into Nigeria.

Practical lessons. The penalty here is large and illustrates the upward trend toward increased enforcement and harsh penalties. It is, to date, the largest FCPA criminal penalty ever assessed.

Also, it is worth noting that the DOJ's investigation in this case followed from a voluntary disclosure by Vetco. DOJ officials recently stated that voluntary disclosures will result in "a real, tangible benefit" to the company.[44] As this case illustrates, however, companies should not expect a free pass from the government when they voluntarily report wrongdoing.

Schnitzer Steel Industries, Inc.

On October 16, 2006, the DOJ and SEC announced a plea and settlement with Schnitzer Steel Industries, Inc., based in Portland, Oregon, and its foreign subsidiary, SSI Korea.[45] In the plea documents, SSI Korea admitted that it violated the FCPA's anti-bribery provisions by making more than $1.8 million in corrupt payments.

Facts and background. Over a five-year period, SSI Korea made corrupt payments to government-owned steel mill managers in China. The payments were made to induce the steel mill managers to purchase scrap metal from Schnitzer Steel. The bribes, which took the form of commissions, refunds, and gratuities through off-book bank accounts, led to a substantial increase in business. In addition, the SEC alleged that Schnitzer Steel violated the FCPA's books and records and internal controls provisions.

To settle the criminal and administrative charges levied against it for violating the FCPA, Schnitzer Steel agreed to pay a total of $15.2 million. In the criminal proceeding, the company's wholly owned subsidiary, SSI Korea, pled guilty to violations of the FCPA's anti-bribery and books and records provisions. SSI Korea agreed to pay a $7.5 million criminal fine.

The DOJ deferred prosecution against Schnitzer Steel, the parent corporation. In the deferred prosecution agreement, Schnitzer Steel accepted responsibility for the conduct of its employees and agreed to enhance its internal compliance measures. The deferred prosecution agreement also provided for the appointment of an independent compliance consultant to review Schnitzer Steel's compliance program and monitor the implementation of new internal controls related to the FCPA. In the parallel SEC administrative proceeding, Schnitzer Steel consented to the entry of a cease-and-desist order and agreed to pay a $7.7 million civil penalty.

Practical lessons. Among its many lessons, *Schnitzer Steel* reflects the increasingly common use of FCPA compliance monitors. It should be noted, however, that Assistant Attorney General Fisher recently explained that "there is no presumption that a compliance consultant is required in every FCPA disposition." According to Fisher, when considering whether to require a compliance consultant, the DOJ will consider "the strength of the company's existing management and compliance team, the pervasiveness of the problem, and the strength of the company's existing FCPA policies and procedures."[46]

Statoil ASA

On October 13, 2006, the DOJ and SEC announced that Statoil ASA, an international oil company headquartered in Norway and traded on the New York Stock Exchange, had agreed to pay $21 million to settle criminal and administrative charges for violating the FCPA's anti-bribery and accounting provisions. According to the terms of a deferred prosecution agreement, Statoil agreed to a $10.5 million criminal penalty and to the appointment of an independent compliance consultant who will review and report on Statoil's FCPA compliance.[47] In the parallel SEC administrative proceeding, Statoil consented to the entry of an administrative order requiring the company to cease and desist from committing any future FCPA violations, and to pay disgorgement of an additional $10.5 million.[48]

Facts and background. The conduct giving rise to these large settlements stemmed from Statoil's efforts to win oil and gas contracts in Iran. In 2001, Statoil developed contacts with the head of the Iranian Fuel Consumption Optimizing Organization, a subsidiary of the National Iranian Oil Company. Following a series of negotiations, Statoil entered into a "consulting contract" with an offshore intermediary. The purpose of the consulting agreement, which called for the payment of more than $15 million over eleven years, was to induce the Iranian official to use his influence to help Statoil obtain a lucrative oil contract and to open doors for future oil and gas projects in Iran. Statoil paid two bribes, totaling more than $5 million, to the Iranian official, and Statoil obtained the oil contract it was seeking.

According to the SEC, Statoil employees circumvented the company's internal controls that were designed to prevent illegal payments, and Statoil lacked sufficient internal controls. Statoil also violated the books and records provisions by mischaracterizing the payments as legitimate consulting fees.

Practical lessons. This case is a reminder that even foreign companies may be subject to the FCPA. Statoil is a Norwegian company that is majority-owned by the government of Norway. Nevertheless, because its American Depository Receipts, or ADRs,[49] trade on the New York Stock Exchange, it is an issuer under the FCPA and, therefore, subject to jurisdiction in the United States. Assistant Attorney General Fisher noted that the criminal enforcement action against Statoil was intended as "a clear message" to foreign companies trading on the American exchanges that they must comply with U.S. laws. Fisher added that "[t]his prosecution demonstrates the Justice Department's commitment vigorously to enforce the FCPA against all international businesses whose conduct falls within its scope."[50]

The Titan Corporation

In March 2005, the DOJ and SEC announced the filing of settled enforcement actions against The Titan Corporation (Titan), a San Diego-based military intelligence and communications com-

pany.[51] The settlement stemmed from charges that Titan had violated the FCPA's anti-bribery and accounting provisions. In settling the actions, Titan consented to pay $15.5 million in disgorgement and prejudgment interest, as well as a $13 million criminal penalty. Titan also agreed to retain an independent consultant to review and make recommendations about Titan's FCPA compliance policies.

Facts and background. In 1998, Titan launched a project to build a telecommunications network in Benin, Africa. From 1999 to 2001, Titan paid more than $3.5 million to its agent in Benin, who was a known business adviser to that country's President. Approximately $2 million of these payments were directed toward the President's re-election campaign. According to the government, Titan's payments were made for the purpose of enabling the company to develop its telecommunications project and to obtain the Benin government's consent to increase the management fees. Titan also failed to conduct any meaningful due diligence into its agent's background and failed to ensure that the services invoiced by the agent had in fact been provided. Moreover, Titan improperly recorded payments in its books and records, directed agents to falsify invoices, and failed to devise or maintain an effective system of internal controls.

Practical lessons. The size of the penalty—a combined $28.5 million—coupled with the fact that the DOJ and SEC pursued parallel investigations, illustrates that both agencies are serious about FCPA enforcement. This case also illustrates how penalties for violating the FCPA can extend beyond the company and impact individual officers. In fact, FCPA actions brought against companies frequently spill over to enforcement and criminal actions against the responsible individuals. In this case, Steven Lynwood Head, the former chief executive officer of Titan, pled guilty to FCPA violations based on his role in the conduct described above.[52] In the guise of "advanced social payments," Head authorized the aforementioned payments to the President's re-election campaign and then submitted false invoices to hide the payments. Head is cooperating with the DOJ in its ongoing investigation of other individuals formerly associated with Titan. Head is expected to be sentenced in July 2007.

Kozeny

The U.S. District Court for the Southern District of New York recently dismissed FCPA charges against two of three defendants in *United States v. Kozeny et al.* On May 12, 2005, a federal grand jury in the Southern District of New York returned an indictment against Viktor Kozeny; Frederic Bourke, Jr.; and David Pinkerton for allegedly participating in a massive scheme to bribe senior government officials in Azerbaijan. The indictment subsequently was unsealed and made public on October 6, 2005.[53]

Facts and background. The three men allegedly bribed government officials to ensure that those officials would privatize the State Oil Company of the Azerbaijan Republic (SOCAR), thus allowing Kozeny, Bourke, Pinkerton, and others to share in the anticipated profits arising from that privatization. The twenty-seven-count indictment includes violations of the FCPA and conspiracy to violate the FCPA, as well as other crimes.

Numerous individuals, including Bourke and Pinkerton, invested in two companies owned and controlled by Kozeny. Those companies participated in the privatization program. Having invested in Kozeny's companies, the three men allegedly made a series of corrupt payments and promises to pay to several government officials, including senior officials in the Azeri government, a senior official of SOCAR, and two senior officials of the State Property Committee (SPC), the agency responsible for administering the privatization program.

The indictment alleges that the corrupt payments took several forms. Kozeny allegedly promised to transfer to Azeri officials two-thirds of certain vouchers and options purchased by his companies, and to give two-thirds of all the profits gained from the investments in SOCAR's privatization. In exchange for this "two-thirds transfer," Azeri officials allegedly agreed to allow Kozeny and his investors to acquire a controlling interest in SOCAR on its privatization.

Next, the indictment alleges that $300 million of stock in one of Kozeny's companies was corruptly transferred to one or more Azeri officials. Kozeny also is alleged to have paid more than $11 million directly to Azeri officials and their family members, and to have arranged for a London jeweler to travel to Azerbaijan to deliver gifts, valued at more than $600,000, to SPC officials. Finally, Kozeny and Bourke allegedly arranged for SPC officials to travel to New York City on multiple occasions to receive medical treatment. Kozeny's companies paid for the SPC officials' hotel, meal, and shopping expenses.

District court ruling. Pinkerton and Bourke moved separately to dismiss the FCPA counts as time barred. Kozeny, who has refused to appear in the case and is awaiting extradition from the Bahamas, did not join in that motion. On June 21, 2007, the district court

granted the motions to dismiss.[54] The court noted that the majority of the conduct charged in the indictment occurred between March and July 1998; thus, the court held, the five-year limitations period[55] had run prior to the May 2005 indictment. The court rejected the government's attempts to use a federal tolling statute[56] to bring the charged conduct within the limitations period.

Practical lessons. This case illustrates the broad scope of the FCPA's jurisdictional provisions. Kozeny is a Czech national, an Irish citizen, and resident of the Bahamas. The charged conduct occurred outside the United States. Nevertheless, Kozeny was charged as an agent of his companies' co-investors, most of whom were American citizens and domestic concerns.

Moreover, although Bourke and Pinkerton made appearances, Kozeny refused to appear. He eventually was arrested in the Bahamas, and his extradition to the United States is pending. This illustrates the cooperation of sovereigns that is becoming increasingly common in FCPA enforcement actions, due in large part to an expanding network of international treaties that provide for cooperation among governments in anti-corruption cases. Finally, this case illustrates that, like other criminal investigations, the government must act within the limitations period to bring FCPA cases or risk dismissal.

Conclusion

Over the past several years, the FCPA has found new prominence as the DOJ and SEC have dramatically increased the number of FCPA enforcement actions and the penalties imposed for FCPA violations. By virtue of expanding cooperation and networking among international governments, enforcement likely will continue to increase. It therefore is critical that U.S. companies doing business overseas understand and follow the requirements of the FCPA. More important, U.S. companies must reexamine their compliance policies, closely scrutinize their overseas business contacts, and institute adequate internal controls to help ensure compliance with the FCPA.

Notes

1. 15 U.S.C. §§ 78dd-1 *et seq*.

2. *See, e.g.*, Hotchkiss, "The Sleeping Dog Stirs: New Signs of Life in Efforts to End Corruption in International Business," 17 *J. Public Pol'y & Mktg.* 108 (1998) (noting the Foreign Corrupt Practices Act (FCPA) was a "legal sleeping dog" until recent times); Pines, Comment, "Amending the Foreign Corrupt Practices Act to Include a Private Right of Action," 82 *Cal. L.Rev.* 185, 192-95 (1994) (criticizing the "extremely limited enforcement" of the FCPA and warning the lack of enforcement signaled a "lack of U.S. resolve on this issue"); Shabat, Comment, "SEC Regulation of Attorneys Under the Foreign Corrupt Practices Act: Decisions on Efficiency and Their Role in International Anti-Bribery Efforts," 20 *U. Pa. J. Int'l Econ. L.* 987, 999 (1999) (discussing the scarcity of FCPA enforcement actions until 1997).

3. Leander, "In China, You Better Watch Out," *CFO.Com* (March 20, 2006), available at http://www.cfo.com/article.cfm/5622331?f=related. *See also* "Bribery and Business: The Short Arm of the Law," *The Economist* (Feb. 28, 2002), available at http://www.economist.com/displaystory.cfm?story_id=1010969 (discussing FCPA enforcement trends and noting "[t]he pace of prosecution is at least accelerating").

4. *See* Leone, "Coming Clean About Bribery," *CFO.Com* (April 3, 2006), available at http://www.cfo.com/article.cfm/6764209/c_2984290/?f=archives.

5. Prepared Remarks of Alice S. Fisher at the American Bar Association National Institute on the Foreign Corrupt Practices Act, Washington, D.C. (Oct. 16, 2006), available at http://www.usdoj.gov/criminal/fraud/docs/reports/speech/2006/10-16-06AAGFCPASpeech.pdf.

6. *See* Ernst & Young, "9th Global Fraud Survey" (2006), available at http://www.ey.com/global/content.nsf/International/FIDS_-_9th_Global_Fraud_Survey.

7. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), and 78dd-3(a).

8. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), and 78dd-3(a).

9. 15 U.S.C. § 78m(b)(2).

10. 15 U.S.C. § 78dd-2(h)(1).

11. 15 U.S.C. §§ 78dd-1(a) and 78dd-2(a).

12. *See* U.S. Department of Justice (DOJ) Press Release, "ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd. Plead Guilty to Foreign Bribery Charges" (July 6, 2004), available at http://www.usdoj.gov/opa/pr/2004/July/04_crm_465.htm (noting that this was the second case to charge a foreign company under 15 U.S.C. § 78dd-3).

13. S. Rep. No. 114, 95th Cong. 1st Sess. 10 (1977).

14. 18 U.S.C. § 201.

15. 15 U.S.C. § 78dd-1(f)(1).

16. *See, e.g., United States v. Giffen*, 379 F.Supp.2d 337 (S.D.N.Y. 2004) (defendant was charged with paying bribes of $78 million to the former Prime Minister and Oil Minister and the current President of the Republic of Kazakhstan).

17. *See, e.g., SEC v. Yaw Osei Amoako*, 3:05-CV-04284-GEB-JJH (D.N.J. 2005) (Securities and Exchange Commission (SEC) alleging improper payments to a senior official in Nigerian Telecommunications Limited, a government-owned telephone company).

18. *See U.S. v. Young & Rubican, Inc.*, 741 F.Supp. 334, 350 n.14 (D.Conn. 1990) (DOJ asserting that a Jamaican businessman who was not employed by the government or any government department, agency, or instrumentality was a "foreign official" due to his close political ties to the Jamaican Labor Party and his role as a consultant to the Jamaica Tourist Board).

19. 15 U.S.C. § 78dd-1(a)(2).

20. Under the FCPA, a "public international organization" means any organization that has been designated by Executive Order pursuant to the International Organizations Immunities Act (22 U.S.C. § 288), or any other international organization designated by the U.S. President by Executive Order. *See* 15 U.S.C. § 78dd-1(f)(1)(B).

21. 15 U.S.C. § 78dd-1(a)(3).

22. 15 U.S.C. § 78dd-1(f)(2).

23. H.R. Conf. Rep. No. 100-579 at 919-20 (1988).

24. *See* http://www.transparency.org/policy_research/surveys_indices/cpi/2006.

25. *See* DOJ online publication, "Foreign Corrupt Practices Act Antibribery Provisions," available at http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html.

26. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), and 78dd-3(b).

27. 15 U.S.C. § 78dd-1(f)(3).

28. 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), and 78dd-3(c)(1).

29. 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), and 78dd-3(c)(2).

30. *See* DOJ Opinion Release No. 83-3 (July 26, 1983).

31. 15 U.S.C. § 78m(b)(2)(A) and (B).

32. 15 U.S.C. § 78m(b)(6).

33. 15 U.S.C. § 78m(b)(2)(A).

34. 15 U.S.C. § 78m(b)(7).

35. 15 U.S.C. § 78m(b)(2)(B)

36. 15 U.S.C. § 78m(b)(7).

37. 15 U.S.C. §§ 78dd-2(g), 78dd-3(e), and 78ff(c)(1)(A) and (2)(A).

38. 18 U.S.C. § 3571(d).

39. 15 U.S.C. § 78ff(a).

40. 15 U.S.C. §§ 78dd-2(g)(1)(B), 78dd-2(g)(2)(B), 78dd-3(e)(1)(B), 78dd-3(e)(2)(B), 78ff(c)(1)(B), and 78ff(c)(2)(B).

41. 15 U.S.C. §§ 78u and 78u-3.

42. *See SEC v. Baker Hughes, Inc.*, No. H-07-1408 (S.D.Tex. 2007); SEC Litigation Release No. 20094 (April 26, 2007), available at http://www.sec.gov/litigation/litreleases/2007/lr20094.htm; *U.S. v. Baker Hughes Services Int'l, Inc.*, No. H-07-129 (S.D.Tex. 2007); U.S. DOJ Press Release, "Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay $11 Million Criminal Fine as Part of Largest Combined Sanction Ever Imposed in FCPA Case" (April 26, 2007), available at http://www.usdoj.gov/opa/pr/2007/April/07_crm_296.html.

43. *See U.S. v. Vetco Gray Controls, Inc., Vetco Gray UK Limited, and Vetco Gray Controls Limited*, No. 4:07-cr-00004 (S.D.Tex. Feb. 6, 2007); U.S. DOJ Press Release, "Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 Million in Criminal Fines" (Feb. 6, 2007), available at http://www.usdoj.gov/opa/pr/2007/February/07_crm_075.html.

44. Fisher, *supra* note 5.

45. *In the Matter of Schnitzer Steel Industries, Inc.*, SEC Administrative Proceeding No. 3-12456 (Oct. 16, 2006), available at http://www.sec.gov/litigation/admin/2006/34-54606.pdf; *U.S. v. SSI Int'l Far East Ltd.*, No. CR 06-398-KI (D.Ore. Oct. 2006); U.S. DOJ Press Release, "Schnitzer Steel Industries Inc.'s Subsidiary Pleads Guilty to Foreign Bribes and Agrees to Pay a $7.5 Million Criminal Penalty" (Oct. 16, 2006), available at http://www.usdoj.gov/criminal/pr/press_releases/2006/10/2006_4809_10-16-06schnitzerfraud.pdf.

46. Fisher, *supra* note 5.

47. *United States v. Statoil, ASA*, 1:06-cr-00960-RJH-ALL (S.D.N.Y. 2006); U.S. DOJ Press Release, "U.S. Resolves Probe Against Oil Company that Bribed Iranian Official" (Oct. 13, 2006), available at http://www.usdoj.gov/opa/pr/2006/October/06_crm_700.html.

48. *In the Matter of Statoil, ASA*, SEC Administrative Proceeding No. 3-12453 (Oct. 13, 2006); SEC Press Release, "SEC Sanctions Statoil for Bribes to Iranian Government Official" (Oct. 13, 2006), available at http://www.sec.gov/news/press/2006/2006-174.htm.

49. American Depository Receipts, or ADRs, are receipts for the shares of a foreign-based corporation. Instead of buying shares of foreign-based companies in overseas markets, U.S. investors can buy shares in the United States in the form of ADRs. The receipt is held by a U.S. bank, but shareholders are entitled to any dividends and capital gains.

50. Fisher, *supra* note 5.

51. *See SEC v. Titan Corp.*, No. 05-CV-0411 (D.D.C. 2005); *United States v. Titan Corp.*, No. 05-CR-0314-BEN (S.D.Cal. 2005). For a detailed description of the settlement terms, *see* SEC News Digest 2005-39, "Enforcement Proceedings," 2005 WL 469201 (March 1, 2005).

52. *See U.S. v. Steven Lynwood Head*, No. 06-cr-01380 (S.D.Cal. 2006).

53. *See U.S. v. Kozeny et al.*, No. 1:05-cr-00518-RCC-ALL (S.D.N.Y. 2005). For the indictment and DOJ press release, *see* http://www.usdoj.gov/usao/nys/pressreleases/October05/kozenyetalindictment.pdf.

54. 2007 U.S. Dist. LEXIS 45590 (S.D.N.Y. June 21, 2007).

55. 18 U.S.C. § 3282 (the federal "catchall" limitations statute, which applies to violations of the FCPA).

56. 18. U.S.C. § 3292. ■