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FCPA Investigations: Working Through A Media Crisis

By F. Joseph Warin, Esq., and Andrew S. Boutros, Esq.

There can be little doubt that enforcement of the Foreign Corrupt Practices Act is on a real and measurable upsurge. However, quarterbacking a corporate FCPA investigation requires much more than just skilled handling of evolving and complicated legal issues. More than ever, it requires adroit management of the public relations component that arises in the wake of allegations of international bribery.

To be sure, federal prosecutors and Securities and Exchange Commission enforcement officials are a formidable and omnipresent force in any corporate FCPA investigation. But a company must not lose sight of the panoply of other interested constituents that are often hungry for information, such as customers, employees, business partners and the investor community, including private equity firms and hedge funds. When a story breaks, these groups will undoubtedly hear a message; the only real question is whether that message will be controlled by the media or piloted by the company.

This commentary delves into the topic of managing a media crisis, with particular emphasis on the public relations and media considerations that companies should carefully consider in an FCPA investigation. Along the way, it includes a case study on the subject through a review of the corporate disclosure statements in response to allegations of worldwide corruption in the United Nations' oil-for-food program.

The Media Worthiness of an FCPA Investigation

The inherent intrigue of foreign corruption, international bribery and the ever-present potential of high-ranking foreign officials' involvement, or even the involvement of unfriendly foreign nations, can attract intense public attention to any FCPA investigation. But the circumstances of a specific case can balloon the media attention a company receives. Indeed, as one might expect, there is a direct correlation between the size and market standing of a company and the potential media frenzy it can expect from allegations of FCPA violations: the larger and more identifiable the corporation, the greater the newsworthiness of the allegations.

Similarly, the larger, more regular and longer in duration the improper payments, the more media-worthy a story becomes. Payments to a high-ranking foreign minister will earn more notice than gratuities to lowly customs officials. And, if the country where the improper payments are alleged to have occurred is already in the headlines for unattractive geopolitical reasons, such as the development of weapons of mass destruction, an FCPA investigation arising in that country can serve as an immediate corporate lightning rod from a media and public relations standpoint.

The corruption of the U.N.'s oil-for-food program was a coalescence of all these elements, and it amply demonstrates how these factors play out. Allegations made both before and after the U.S. invasion of Iraq in March 2003 said more than 2,000 companies may have made extra-contractual payments totaling nearly $2 billion to the Iraqi government, arguably outside the scope of the oil-for-food program. When news of these payments surfaced, they brewed a perfect storm for a public relations crisis.

For starters, the long arms of the allegations reached across the globe and implicated corporations that were not just household names, but captains of industries. The allegations focused on improper payments to the government of Saddam Hussein, the brutal dictator of Iraq and an archenemy of much of the West for more than a decade. The allegations included stark examples of mismanagement at the United Nations and unadulterated criminal conduct by senior U.N. officials. The total dollar

figures at issue were staggering, and the number of companies identified in the scandal was unprecedented.

The world took notice, and in the United States, not only did that mean that federal officials would investigate, but the high-profile nature of the allegations, along with the simultaneous war in Iraq, ensured that Congress and even the White House would demand public answers and seek to hold the responsible parties accountable. This story was too big for the media to sit on the sidelines or wait passively for information to be released; the media would have a prominent and active role in this time of corporate upheaval.

Since 2004, 34 companies have filed disclosure statements with the SEC about their respective oil-for-food program investigations.[1] These companies are headquartered in the U.S. and Europe, and they range from worldwide multinationals to smaller market capital issuers.[2] They cover both sides of the oil-for-food program: those that bought oil from Iraq and those that sold humanitarian and infrastructure products intended for the Iraqi people.[3] Their disclosures highlight not only the different choices they made in deciding what to first reveal about their investigations, but also how those choices changed over time, especially as more and more information was gathered and synthesized. Each decision reveals a way of understanding how to manage the media in what could readily become a public relations crisis.

Controlling the Media Frenzy

The single most important way to manage what can be overwhelming media attention is to have a robust yet nimbly flexible action plan. In a media frenzy, time is of the essence; it is both a critical and scarce resource. The news cycle no longer ends at the deadline for major newspapers, but continues 24 hours a day. Working on a communications plan before the press comes knocking is far better than having to work on both a response *and* a plan when a crisis hits.

Planning begins by identifying where a crisis might start. For many if not most businesses operating in a global economy, a potential violation of the FCPA is a source of vulnerability. By recognizing it, corporations can go on to develop plans that will prove useful to have and publicize in a crisis: compliance and training programs, strong zero-tolerance policies, effective yet fair disciplinary protocols and information management plans.

One of the first decisions to make in managing information is whether to publicize this information, by either reaching out to the media or making a disclosure in an SEC filing.[4] This is, admittedly, an incredibly difficult — and at times agonizing — decision to make, so much so that it has led to the development of highly sought-after lawyers, commonly referred to as disclosure lawyers. The decision to disclose to the public or speak to the media is naturally a fact-bound process; it is not one that can be made in a vacuum.

The securities laws require that disclosures be made on a periodic basis (that is, in annual and quarterly reports) as well as when triggered by certain events (Form 8-K). In either case, the driving force for whether a company must disclose information such as an allegation of an FCPA violation often hinges on whether the information is *material*.[5] Many securities antifraud rules, such as Rule 10b-5, also turn on materiality.[6] Broadly speaking, a fact is material if "there is a substantial likelihood that a reasonable shareholder would consider it important" in making an investment-related decision.[7]

Disclosures of FCPA investigations can be contemplated under various circumstances. In the MD&A (management discussion and analysis) section of filings, management must discuss and analyze "material events and uncertainties … that would cause reported financial information not to be necessarily indicative of … future financial condition."[8] Item 103 requires companies to report "any material pending legal proceedings … [including] such proceedings known to be contemplated by governmental authorities."[9]

Additionally, each year management must make "an assessment of the effectiveness of [the company's] internal control over financial reporting,"[10] which may relate to the internal controls provision of the FCPA.[11] And Form 8-K has an optional catchall category that allows companies to disclose "any events … that the registrant deems of importance to security holders."[12]

The Sarbanes-Oxley Act of 2002 has also had an impact on FCPA disclosures. Section 302 requires signing officers to disclose to a company's board of directors "any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal controls."[13] Certain FCPA violations can trigger this requirement. Furthermore, some remedial changes made as a result of an FCPA investigation may significantly alter a company's internal controls; such internal control changes may also require disclosure under Sarbanes-Oxley.[14]

The decision to talk to the media and the duty to disclose, then, require judicious consideration of context and history. For instance, a company must consider whether:

- The conduct in question affects a key business area;

- The dollar figures at issue are substantial, and the potential fines would be material from a securities law standpoint;
- The conduct involves senior management or calls into question their ability to lead;
- The company is cooperating with the government in other FCPA (or other criminal/administrative) investigations that have already been disclosed to the public;
- The conduct in question occurred over a substantial period of time;
- The conduct implicates material weaknesses in internal controls; and
- The company has been in trouble for this sort of behavior before.

Additionally, although a company may well decide to announce its receipt of a subpoena in an 8-K but say nothing to the media, these two questions are not mutually exclusive. As discussed below, once a company chooses to go public, it may find it exceedingly difficult to say "no comment" afterward.

Admittedly, a balancing of these and other considerations often lead lawyers to counsel management to "circle the wagons" so as to avoid saying anything that might later be held against the company by regulators or class-action plaintiffs, whether inside or outside of court. Ingersoll-Rand Co., for example, issued its first disclosure in March 2005 that it was being investigated by the SEC for its participation in the oil-for-food program.[15] This disclosure was followed by 10 others over the next two years, most of which merely restated the first.[16] By contrast, Textron Inc. did not disclose anything relating to its oil-for-food program investigation until August when it revealed its non-prosecution agreement with the Justice Department and a $4.7 million monetary payment to the agency and the SEC.[17]

But the downside of a "silent treatment" policy is that a company can emerge from an FCPA scandal with its reputation in tatters, its shareholders alienated and its market capitalization adversely affected. If an FCPA investigation has been disclosed in a public filing or if the media have somehow gotten wind of an investigation, a "no comment" policy may allow the audience to assume the worst, when in fact the matter might be modest and not material.

Perhaps even more dangerous, journalists often infer from silence that there must be something the company is hiding, a perception that may only intensify their questioning. So even if the company does not want to comment on the litigation or its own internal investigation, there are other messages it can promote. In the oil-for-food program matter, for instance, many companies refrained from disclosing the specifics of the alleged wrongdoing, but almost every company promised to cooperate with investigators.[18]

Once a company discloses information in SEC filings, it must determine whether it has a duty to update that information. Similarly, once a company decides to "open the door" to the press, it cannot close it or even attempt to do so. Journalists will look for ways to keep a story alive, and the media will give the company no credit for having been open and informative in its initial comments if it later goes silent.

Companies that talk to the media about their FCPA investigations must continue to provide accurate and timely information during the lifecycle of an investigation. And a decision whether to talk to the media must be made *quickly*. If the company does not take control of a message, the media will look to other sources to provide a sound bite — sources that may not be reliable or friendly.

Limiting Company Exposure Once News Hits

Preparation is a common and key theme to limiting the media fallout of an FCPA investigation. Well before a crisis becomes public, the company should cultivate positive relationships with reporters by making sure someone in the corporate organization is available to the press for interviews, background and story ideas. It is far more difficult to shape the media coverage of a crisis if there is no prior relationship with the reporters covering the story. Investing the time to provide accurate information will build credibility and help the company get a fair — or, at least, more fair — "public relations hearing" during a crisis.

Similarly, building relationships in overseas communities can prove vitally important if news of an FCPA investigation breaks. If the company can enlist the support of local charity groups and civic organizations because of its prior good works, it can show itself as responsive to local citizens' needs and concerns, rather than as an unsympathetic corporation willing to make improper payments to officials to get its way.

As part of its preparation strategy, the company should identify a spokesperson who will address all FCPA issues. If the allegations are serious enough, someone from senior management, rather than the everyday public relations coordinator, may want to handle the announcements. As an example of a response that is both executive-level and sensitive to local needs, the CEO for Novo Nordisk, a Danish

participant in the oil-for-food program, offered a defense in the company's initial SEC filing. "We have supplied the Iraqi people with insulin for the last 15 years, and we have traded there for 30," he said.[19] "If we had opted to withdraw from Iraq, I'm not sure that the Iraqis would have been able to obtain the medicine they needed."[20]

Where possible, the spokesperson should have practice handling news conferences and answering questions. The company may even want to consider having a response team on the ground in the overseas location of the alleged improper payments. Being on location sends a message that management is taking a hands-on approach to allegations of improper payments, rather than seeming aloof and unresponsive.

Almost as important as having a spokesperson, the company should communicate to its staff that all media inquiries about the investigation should be routed through established channels and answered by the spokesperson. Employees should be made aware that there are no such things as "off the record" comments. And, even more innocently, "leaked" information is often given to the press by employees who are unaware that they should not be speaking for the company.

The Story: What to Tell the Press and Investors

The primary concern in any message to the media or to shareholders must be accuracy. If a company discusses an FCPA investigation, it must stick to the facts. The company should be wary of cabining itself by making definitive statements. Almost inevitably, the initial factual analysis will change substantially over time. Truth typically trickles down in investigations. It is rare that a 72-hour review will capture all the facts and that all those supposed facts will turn out to be correct.

An oil-for-food program corporate participant's claim that "only four or five contracts are in question" could easily turn into a field day for reporters (and be deemed a material misstatement from the perspective of investors) if investigators later uncover it may be 40 or 50. Similarly, if the company discovers that it previously released information now understood to be wrong, it should immediately correct it, with an explanation, if necessary.

Beyond that, the company must determine how much to say. Sometimes it will be the bare minimum. At the onset of an investigation, facts are often unknown and what seems reliably certain can quickly be turned on its head as new information is uncovered and the pieces of the jigsaw puzzle are assembled. For instance, one company in the oil-for-food program, ABB Ltd., disclosed only that it was identified in an independent report by the United Nations as having "made illicit payments to the Iraqi government under contracts for humanitarian goods," information that was readily apparent to anyone familiar with the scandal.[21]

The "less is more" principle serves reasonable goals; it may help minimize the "bad news" and even lower the profile of the investigation. And senior management may not have even realized that an FCPA problem existed, much less the extent of it, prior to a subpoena and subsequent investigation. Without the clarity of additional fact-finding and with an interest in avoiding statements that can be offered in follow-on securities lawsuits and class actions, it often makes sense to be brief.

But choosing to defer an initial response (or saying little initially) until more information is at hand is usually a double-edged sword. Accumulating all the relevant facts will allow the company to confidently answer the myriad of questions it may face, but it leaves the company dangerously silent in the interim. Management can easily lose control over how the investigation is perceived and the impact of the investigation on the company during this waiting period.

As a result, several companies participating in the oil-for-food program have offered more than the bare minimum in their public disclosures. Some have disclosed information such as the amount of the contract in question or the amount of the extra-contractual payment that had been made.[22] Others announced that they were launching investigations of their own or even that they were ready to sit down and meet with the Justice Department and SEC.[23] In fact, some were even ready to state directly in their first disclosure that they had committed no wrongdoing.[24]

These more detailed responses may well be explained as the product of company preparation. Many corporations probably assembled an internal team well before the United Nations issued its report on corporate involvement in the oil-for-food program. Others likely hired crisis management consultants to buttress the work of in-house and outside counsel. Either way, the purpose is the same: If a story is going to break in the press, a company might be better served to break it itself.

Furthermore, some of these companies involved in the oil-for-food program have given not only detailed responses in an initial disclosure, but frequent and substantive updates. In 2006 alone, for instance, one company filed 19 separate disclosures pertaining to the oil-for-food program investigation.[25] It not only announced that it was cooperating with the government but explained how, including allowing foreign investigators to visit its subsidiary's site overseas.[26] It announced the results of its outside counsel's investigation in 2007, including evidence that the company's

subsidiaries had made hundred of thousands of dollars in extra-contractual payments.[27] Soon after, it disclosed that it had terminated the employment of managers of a particular subsidiary and brought disciplinary action against others.[28]

In an FCPA matter unrelated to the oil-for-food program, Johnson & Johnson provided similar forthrightness when it made public in February that subsidiaries outside the United States may have made improper payments in connection with the sale of medical devices and that one of the company's senior executives was resigning over the probe.[29]

Minimizing the Negative Impact On Management and Employees

All FCPA investigations, including those emerging from the oil-for-food program, are a potentially serious distraction for management and employees alike. Not only is everyone more sensitive and guarded to recall conduct that may have occurred years ago, but the demands of responding to the crisis take management's time and focus away from running the business. Even if management is successful in limiting the company's media and public relations exposure, it can still be at the expense of the company's business lines and market growth.

Therefore, one of the best ways a company can help itself in managing the media may be to hire outside help. Whether that assistance is outside counsel, a public relations firm or a crisis management group, such experts will bring the company experience and expertise in dealing with the media. Employees can be relieved from having to fastidiously follow media developments. And management can be relieved from some crisis response work and focus on the most important job: running the company.

Irrespective of who decides to deliver the company's message, what is clear is that the company's response team must continue to shape the story throughout the entire investigation, from beginning to end. Attention to detail must be paid from the moment the company opens the door to the press, through the worst moments of the crisis, all the way to the final press release and negotiated settlement documents.

The negotiated agreement with the government, for instance, should reflect the company's message. FCPA resolutions, whether in the form of cease-and-desist orders, injunctions, non-prosecution agreements or deferred-prosecution agreements, are public documents; they are often viewed as the definitive, authoritative statement to the question of "what really happened." The time, energy, cost and effort of managing a media crisis can all fall in vain if, after years of careful oversight, the government's official press release reads like a one-sided story. Needless to say, there is a substantial difference between an account being described as "bogus" or "secret" and one that was "unauthorized."

Conclusion

Corporate crises are inevitable, and in this time of burgeoning interest from the Justice Department and the SEC, it could easily come in the form of an FCPA investigation. The present-day emphasis on uncovering and punishing corporate malfeasance, combined with the allure of international corruption, ensures media interest, as illustrated in the oil-for-food program matter.

Given that, it is advisable for companies to be forward-thinking and proactive in their tackling of a media or public relations problem. Companies must retain control over the message from the day the information becomes public until after the crisis passes. Simply stated, when responding to an FCPA investigation, like any other crisis, they must not allow the media to become an adversary.

Notes

[1] *See, e.g.*, Baker Hughes Inc., Current Report (Form 8-K) (Dec. 17, 2004); Core Laboratories N.V., Current Report (Form 8-K) (Dec. 22, 2004); El Paso Corp., Annual Report (Form 10-K) (Oct. 12, 2004).

[2] *See, e.g.*, Johnson Controls Inc., Annual Report (Form 10-K) (Dec. 9, 2005); Innospec Inc., Current Report (Form 8-K) (Feb. 7, 2006).

[3] *See, e.g.*, OAO Tatneft, Form 20-F (July 14, 2005); ABB Ltd., Form 20-F (Apr. 19, 2006).

[4] The decision to disclose to the public is separate from the decision to make a voluntary disclosure to government regulators, which involves different considerations altogether.

[5] 17 C.F.R. § 230.408 (2007); 17 C.F.R. § 240.12b-20 (2007).

[6] 17 C.F.R. § 240.10b-5 (2007).

[7] TSC Indus. Inc. v. Northway Inc., 426 U.S. 438, 448 (1976).

[8] 17 C.F.R. § 229.303 (2007).

[9] 17 C.F.R. § 229.103 (2007).

[10] 17 C.F.R. § 229.308 (2007).

[11] 15 U.S.C. § 78m(b)(2)(B) (2007).

[12] Securities and Exchange Commission, Form 8-K, Item 8.01 at Section 8.

[13] 15 U.S.C. § 7241(a)(5)(B) (2007).

[14] 15 U.S.C. § 7241(a)(6) (2007).

[15] *See* Ingersoll-Rand Co. Ltd., Annual Report (Form 10-K) (Mar. 16, 2005).

[16] *See, e.g.*, Ingersoll-Rand Co. Ltd., Quarterly Report (Form 10-Q) (May 5, 2005); Quarterly Report (Form 10-Q) (Nov. 4, 2005).

[17] *See* Textron Inc., Current Report (Form 8-K) (Aug. 24, 2007).

[18] *See, e.g.*, St. Jude Med. Inc., Annual Report (Form 10-K) (Mar. 16, 2006); AGCO Corp., Annual Report (Form 10-K) (Mar. 13, 2006).

[19] Novo Nordisk A/S, Report of Foreign Private Issuer (Form 6-K) (Feb. 6, 2006).

[20] *Id.*

[22] ABB Ltd. (Form 20-F) (Apr. 19, 2006).

[22] *See, e.g.*, AKZO Nobel NV, Form 20-F (June 22, 2006); Beckman Coulter Inc., Current Report (Form 8-K) (Dec. 8, 2006).

[23] *See, e.g.*, Rhodia, Report of Foreign Private Issuer (Form 6-K) (Nov. 30, 2005); Johnson Controls Inc., Annual Report (Form 10-K) (Dec. 9, 2005).

[24] *See, e.g.*, Core Laboratories N.V., Current Report (Form 8-K) (Dec. 22, 2004).

[25] *See, e.g.*, Flowserve Corp., Annual Report (Form 10-K) (Feb. 13, 2006).

[26] Flowserve Corp., Quarterly Report (Form 10-Q) (July 28, 2006).

[27] Flowserve Corp., Quarterly Report (Form 10-Q) (May 8, 2006).

[28] Flowserve Corp., Quarterly Report (Form 10-Q) (Aug. 8, 2007).

[29] Avery Johnson, *J&J Reports Improper Payments*, WALL ST. J., Feb. 13, 2007.

F. Joseph Warin *is a partner and* ***Andrew S. Boutros*** *is a senior associate in the Washington office of* ***Gibson, Dunn & Crutcher****. They represent several corporations in government investigations involving the United Nations-sponsored oil-for-food program.* *The authors wish to thank Jackson Eaton, a Gibson, Dunn & Crutcher associate, for his assistance with this commentary.*