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# Analysis

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## Combating Corruption: Lessons And Trends From 2008 FCPA Enforcement

Siemens Aktiengesellshaft's $1.6 billion final settlement with U.S. and German authorities on Dec. 12, 2008 placed a dramatic exclamation point at the end of another banner year for enforcement of the Foreign Corrupt Practices Act (FCPA), 15 USCA §§ 78dd-1, 78dd-2 and 78dd-3. Although the number of enforcement actions fell slightly from the 2007 record high, the 2008 enforcement actions remain significant in terms of both the number of prosecutions and civil cases brought as well as the penalties imposed. This article reviews the enforcement actions brought or concluded within the past year, and identifies the enforcement trends and the lessons companies engaged in international business and their compliance officers should consider in evaluating their anti-corruption compliance and training programs.

**The Internationalization of Anti-Corruption Enforcement**—One story perhaps best illustrates the increase in and maturity of the cross-border investigative cooperation of foreign bribery that has occurred since the 1998 Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials went into effect. In June 2004, the story broke in the international press, including the Financial Times, Wall Street Journal and New York Times, that a French magistrate investigated a Halliburton subsidiary's payments to a Gibraltar company controlled by a British lawyer in connection with the subsidiary's, Kellogg, Brown and Root's (KBR), participation in the development of the Bonny Island liquefied natural gas production facility in Nigeria. The U.S. Department of Justice and Securities and Exchange Commission soon followed suit, and on Sept. 3, 2008, Jack Stanley, the former CEO of KBR and its predecessor, M.W. Kellogg, pleaded guilty to conspiracy to violate the FCPA and consented to a permanent injunction with the SEC.

According to the charging papers, Stanley authorized approximately $180 million in bribes to obtain $6 billion in business for the joint venture of which Kellogg and subsequently KBR was a partner. Bribes for senior Nigerian officials were passed through the British consultant and the Gibraltar company's Swiss bank accounts. Bribes to lesser officials were passed through consultant agreements with a Japanese company. DOJ credited the significant cooperation it had received from France, Italy, Switzerland and the UK. Nor is Stanley's likely to be the only prosecution arising from this scheme. On January 26, Halliburton, which has since divested KBR, announced that it had reached tentative agreements to pay DOJ $362 million in criminal penalties and the SEC $177 million in disgorgement.

In addition to more effective multinational investigative cooperation, the 2008 enforcement actions also underscore the U.S. enforcement agencies' willingness to pursue foreign companies and individuals whose conduct falls within the FCPA, even if that same conduct may be prosecuted elsewhere, including in the defendant's home country. The Siemens case is just the most recent example of prosecution and civil actions against a foreign company with American Depository Receipts (ADRs) being treated as an "issuer" and subject to U.S. jurisdiction for conduct elsewhere. Siemens not only settled with U.S. authorities, but also with the Munich Prosecutors Office, which received more than half of the approximately $1.6 billion in fines and disgorgement levied on Siemens. Two of its subsidiaries, Siemens Bangladesh Ltd. and Siemens S.A. (Venezuela), pleaded guilty to conspiracy to violate the FCPA bribery provisions where the contact to the U.S. appears limited to payment of bribes in U.S. dollars that passed through the U.S. banking system.

Other 2008 enforcement actions against foreign persons include the Nov. 12, 2008 guilty plea of Aibel Group Ltd., discussed further below, a UK company whose employees worked for and with its U.S. Vetco Gray subsidiaries in connection with a deep-water oil drilling and exploration project in Nigeria. On Dec. 8,

2008, DOJ announced that Misao Hioki, a Japanese citizen and former general manager of a Bridgestone division in Japan, pleaded guilty to a Sherman Act violation, 15 USCA § 1, and conspiracy to violate the FCPA. Hioki had apparently managed various U.S. sales personnel and authorized $1 million in bribes to be paid to employees of state-owned enterprises in Latin America in connection with the sale of its marine hose products. And, finally, Christian Sapsizian, a French citizen and former employee of Alcatel who was nabbed at the Miami airport in December 2006, was sentenced in September 2008 for his role in a scheme to bribe employees of the telecommunications authority in Costa Rica. Jurisdiction over Sapsizian was premised on his being the employee of a foreign company with ADRs and, hence, an "issuer" under 15 USCA § 78dd-1.

In addition to these U.S. enforcement actions against foreign persons, 2008 also saw some significant prosecutions and enforcement actions by other countries against foreign bribery. In the UK, for example, Niels Tobiason, Managing Director of CBRN Team Ltd. and a Danish national, pleaded guilty to bribing Ugandan officials in connection with obtaining a security-consulting contract with the Ugandan Presidential Guard. This prosecution was widely reported as the first conviction under the UK's foreign bribery statute. Later in 2008, one of the alleged bribe recipients, Ananais Tumukunda, had the misfortune of showing up at Heathrow airport, where he was promptly arrested. He pleaded guilty to receipt of £83,000 in bribes—a prosecutable crime under the UK statute, but not under the FCPA.

Also in the UK, the Serious Fraud Office (SFO) announced in October that it had sought and obtained a civil recovery order to impose a fine on Balfour Beatty in connection with a voluntary disclosure of inaccurate recording of certain "payment irregularities." Beatty self-reported these payment irregularities made in connection with obtaining a $130 million contract to rebuild the Alexandria Library in Egypt, and the settlement marked the first time that the SFO used a civil remedy to reward such voluntary disclosure.

Finally, in November, Pacific Consultants International, a Tokyo-based consulting company, and four of its senior officials pleaded guilty in Japan to paying $820,000 in bribes to Vietnamese government officials to obtain infrastructure development contracts in Ho Chi Minh City, at least partially funded with Japanese foreign aid.

These enforcement actions demonstrate that companies are increasingly at risk of investigation and prosecution in multiple jurisdictions in connection with bribery of foreign government officials. DOJ has cautioned that exposure to prosecution and penalties elsewhere will not guarantee a pass from the U.S., as the Siemens case shows, but DOJ has also demonstrated that it will consider that fact in determining the appropriate penalties.

**Focusing Prosecutions on Individuals and Rewarding Self-Reporting**—For a number of years, DOJ and SEC officials have indicated that companies should voluntarily report transgressions and assist the Government in identifying and punishing the culpable individuals. The 2008 enforcement actions bore out the benefits the companies can receive from voluntary disclosure and cooperation and DOJ's efforts to obtain jail sentences for convicted individuals, even from those who have cooperated.

The 2008 enforcement actions against companies and individuals suggest that DOJ has been willing to forgo prosecution—by a nonprosecution agreement, deferred prosecution agreement, or simply a pass—if the company voluntarily comes forward, conducts a thorough investigation, admits to the conduct and cooperates with DOJ and SEC investigations. For example, on Feb. 14, 2008, Westinghouse Air Brake Technology Co. (WABTEC) agreed to pay a $300,000 criminal fine and enter a nonprosecution agreement with DOJ in connection with various payments made by a fourth-tier subsidiary in India to obtain business with the India Rail Board and state-controlled railways. It also agreed with SEC to disgorge approximately $375,000 in profits from the unlawfully obtained business. On May 14, Willbros Group Inc. and its subsidiary, Willbros International Inc., entered into a deferred prosecution agreement with DOJ and a civil settlement with SEC, paying over $32 million in fines, disgorgement and prejudgment interest for bribes in Nigeria and Ecuador as well as for a scheme to defraud Bolivian tax authorities by falsely claiming value added tax (VAT) credits.

On June 3, AGA Medical Corp. entered into deferred prosecution with DOJ, marking yet another medical device manufacturer caught up in paying kickbacks to doctors at state-owned hospitals to obtain recommendations for the purchase of its devices by patients. In a twist on the usual pattern, however, the charged, but deferred, conduct included fees paid to a patent official to speed up and issue a patent. As discussed further below, this aspect of the case appears to be part of DOJ's skeptical view of conduct that might, if contested by the defendant, meet the FCPA exception

  

for facilitation payments under 15 USCA § 78dd-2(b). AGA agreed to pay a $2 million criminal fine. The AGA settlement was closely followed by Faro Technologies Corp.'s June 5 settlement with DOJ and SEC, in which it paid a total of approximately $3 million in criminal and civil fines in connection with "referral fees" paid to employees of Chinese state-owned enterprises. Faro disclosed that it paid approximately $445,000 to obtain about $5 million in sales of its precision measurement equipment.

In each of these cases, the company voluntarily disclosed the bribes and conducted an extensive internal investigation, although in the Willbros case, the conduct came to light during its internal investigation in response to the Bolivian tax authorities' investigation of the VAT tax scam. Nonetheless, in its press release, DOJ credited Willbros' and its subsidiary's "thorough review of the improper payments, the companies' exemplary cooperation, the companies' implementation of enhanced policies and procedures, and the companies' engagement of an independent corporate monitor." Indeed, although all these companies have escaped prosecution, they have not only been assessed significant fines, but also had to commit to explicit compliance obligations, as well as ongoing cooperation in related, continuing investigations. Required compliance measures usually include appointment of a compliance monitor; adoption of adequate internal controls, policies and procedures; training of corporate officials, employees and agents; implementation of a system through which suspect activities may be reported and appropriately addressed; adoption of disciplinary measures for FCPA violations; and appropriate due diligence of business partners and agents. Frankly, these are appropriate elements of any anti-corruption compliance program for companies engaged in international business, especially international public procurement.

That the companies avoid criminal prosecution through voluntary disclosure does not mean the culpable, usually former, employees will. Thus, in the Willbros matter, for example, two former employees pleaded guilty, Jim Bob Brown in 2006 and Jason Steph in 2007, and await sentencing after cooperating in DOJ's and SEC's investigations. Some fruits of that and the companies' cooperation were revealed on Dec. 19, 2008, when DOJ moved to unseal the indictment of James Tillery, Wilbros International's former president, and Paul Novak, a former consultant to Willbros, after Novak was arrested at a Houston airport after returning from South Africa. He returned to the U.S. after the Government had cancelled his passport and now awaits trial currently scheduled for April 2009. Tillery remains a fugitive.

In other cases, the disclosing companies apparently avoided any fine or other obligations in return for their full disclosure and cooperation. Thus, the global telecommunications firm Teleglobe, within months of closing on its merger in 2004 with ITXC, a publicly traded company, fired a number of employees involved in bribing employees of various state-owned telephone companies in Africa, including Nigeria, Rwanda and Senegal, conduct apparently known but not disclosed during the pre-acquisition due diligence. No action has been taken against the companies, but three of the fired employees have been criminally prosecuted and settled civil actions with SEC. In July 2008, Steven Ott, former vice president of global sales, was sentenced to five years probation with the first year spent first in community confinement and the remainder in home detention. In September 2008, Roger Young, former managing director for the Middle East and Africa regions, received a similar sentence with slightly less confinement. The third employee, Yaw Osei Amoaka, the former regional manager, was sentenced in 2007 to 18 months imprisonment. All paid fines, and Amoaka, who had siphoned off some of the bribe money for his personal benefit, was required by the consent order in the SEC case to pay prejudgment interest and disgorge the amounts stolen, a total of approximately $188,000.

Another company that appears to have avoided DOJ enforcement action while cooperating in the prosecution of its former executives is Pacific Consolidated, whose former president, Martin Self, pleaded guilty on May 7, 2008, and was subsequently sentenced to two years probation and a $20,000 fine. According to his plea agreement, Self approved $70,000 in payments to a consultant who was a close relative of the UK Ministry of Defence's project manager responsible for awarding the company a $5.1 million contract. Lee Winston Smith, Pacific Consolidated's former vice president for marketing, was indicted for the same conduct as well as for allegedly providing $275,000 to assist the UK project manager to purchase a villa in Spain. Smith is scheduled for trial in May 2009.

Other 2008 plea agreements and sentences indicate that individuals prosecuted for FCPA violations should expect jail time even after acceptance of responsibility by pleading guilty and cooperating with on-going investigations. Thus, in September 2008, Sapsizian, the former Alcatel employee, was sentenced to 30 months in prison

and forfeiture of $261,500. In December 2008, Hioki, the former Bridgestone employee, was sentenced to 24 months in prison and an $80,000 fine. And although he has not yet been sentenced, Stanley's plea agreement calls for him to receive a seven-year jail sentence and to pay $10.8 million in restitution, which would be the highest penalty ever levied against an individual in an FCPA case.

The 2008 enforcement actions provide one last cautionary note for companies disclosing to avoid or minimize the potential penalties for FCPA violations: DOJ has demonstrated that it will strictly enforce the terms of any deferred or nonprosecution agreement that it negotiates. Aibel Group learned this lesson the hard way. In February 2007, it entered into a deferred prosecution agreement with DOJ for its involvement as a subsidiary of Vetco International Ltd. in making corrupt payments to Nigerian government officials. Per the terms of the three-year agreement, Aibel Group was to cooperate fully with any U.S. or foreign investigation into it, its affiliates, or any individuals presently or formerly affiliated with the company (e.g., employees, directors, officers and agents). Despite DOJ's acknowledgement that Aibel Group devoted significant resources to compliance with its deferred prosecution agreement, the company apparently failed to meet its obligations in some unspecified way. DOJ terminated the agreement, and on Nov. 21, 2008, Aibel Group pleaded guilty to a superseding information alleging violations of the FCPA's antibribery provisions, and agreed to pay a $4.2 million fine and submit to a two-year organizational probation that includes compliance and reporting obligations.

**Industries and Conduct Targeted**—As in past years, big infrastructure projects such as in the oil and gas industry (e.g., Wilbros Group, Aibel Group and Stanley) and sales of medical devices to state-owned hospitals (e.g., AGA and Siemens) provided fodder for FCPA enforcement. But the 2008 enforcement cases also illustrate that almost any industry looking for international business faces exposure to corruption risk. A few examples should suffice to demonstrate this point. For example, the January 2008 indictment, followed by an October superseding indictment, of Gerald and Patricia Green brought FCPA enforcement to the entertainment industry. The Greens are accused of paying over $1.7 million in bribes to the former governor of the Tourism Authority of Thailand to manage the annual Bangkok International Film Festival and to provide services in connection with a "privilege card" to be offered to tourists to Thailand. The charging papers allege that these bribes were passed through bank accounts of relatives to the Thai official who, along with the Greens, has denied the charges.

Another example is SEC's Aug. 27, 2008 settlement with Con-Way Inc. related to its Philippine freight forwarder subsidiary, Emery Transnational. Without admitting or denying the charges, Con-Way agreed to pay $300,000 to settle SEC's allegations that it had failed to devise a system of internal controls to detect and prevent bribes paid by Emery Transnational to Philippine customs officials both to violate customs regulations and to not enforce legitimate fines. SEC also charged that Emery Transnational bribed employees of state-owned airlines to provide favorable treatment and carriage of its freight, none of which was accurately recorded on its books.

A third example is the pending Sept. 4, 2008 indictment of Nexus Technology and four individuals who are either employees of or consultants to the company. DOJ alleges the defendants bribed various employees of entities in Vietnam owned or controlled by the ministries of Transport (airport authority), Industry (petroleum) and Public Safety (identification system components). According to the indictment, the payments—most of which ranged between $14,000 and $63,000—were funneled through a Hong Kong bank account and recorded as subcontract fees or installment payments. The defendants have pleaded not guilty, and no trial date has been set.

Finally, two cases deserve particular attention because they highlight specific aspects of DOJ enforcement priorities. The first of these is the WABTEC matter noted above. There, the nonprosecution agreement with DOJ admitted to payments to employees of government authorities and state-owned entities for such purposes as scheduling preshipping inspections, having certificates of delivery issued and curbing excessive excise tax audits. Some of the payments for inspections were as small as $67, demonstrating that DOJ accords little respect for the "facilitation payment" exception to the foreign bribery provisions. The second case is the nonprosecution agreement with Faro Technologies. There, the company admitted that the agent of its Chinese subsidiary had asked whether it could "do business the Chinese way," a request which was passed up to U.S. management. The response was no, but management failed to supervise the subsidiary and its agent or establish a system of internal controls to detect and prevent the kickbacks that occurred. The

  

commissions to employees of state-owned customers were booked as "referral fees."

**Other Trends of Interest**—Three other trends apparent from the 2008 FCPA enforcement actions deserve brief mention. The first is discovery of FCPA violations in the context of other investigations of unlawful conduct in international transactions. DOJ has regularly cautioned since the Schnitzer Steel settlement in 2006 that it would charge other crimes—such as the defrauding of private entity customers through bribes—if discovered during the course of an FCPA investigation. In at least two 2008 enforcement actions, the discovery of the FCPA violation appears to have occurred in the context of other investigations. The first of these cases is the conviction of Hioki, the former Bridgestone employee discussed above, whose activities were apparently uncovered in the long-running price-fixing investigation of the marine hose industry. Suggesting this combination of crimes may not be unique; in late December 2008, the Swiss engineering firm, ABB—which faced FCPA enforcement in 2004 in connection with its sale of the Vetco Gray entities—announced that it took an $850 million charge in its fourth quarter in connection with the anticipated consequences of on-going EU price-fixing and U.S. FCPA investigations.

The second is the Nov. 17, 2008 conviction of Shu Quan-Sheng after his guilty plea to various Arms Export Control Act violations, including unlicensed transfer of defense articles and services related to development of a liquid hydrogen tank system for a new Chinese rocket launch facility. Acting as an agent for an unnamed French company with ADRs, Shu apparently offered "participation points" to various Chinese government officials in connection with seeking a contract for the liquid hydrogen tank system. Interestingly, according to the charging documents, at least one such offer was declined.

A somewhat related trend is demonstrated by the Stanley (KBR) and Amoaka (ITXC) prosecutions discussed above. Just as companies willing to break other laws in the conduct of their international business may violate the FCPA, individuals who are willing to authorize bribes to obtain business for the company are likely to skim some of that money for themselves. When such conduct is detected, companies that settle with DOJ and SEC may be able and willing to pursue their former employees as Willbros Group is doing against Tillery. On Dec. 23, 2008, Willbros commenced a lawsuit against Tillery and various former consultants, including Novak and Hydrodive International, Ltd. alleging inter alia that Tillery had an undisclosed interest in Hydrodive before causing Willbros to enter into a consulting contract with that firm.

Finally, the last trend to note is DOJ's expansion of its enforcement arsenal to include efforts to obtain recovery of unlawful payments, even in the hands of third parties. As noted above, one of the Siemens subsidiaries to plead guilty was Siemens Bangladesh Ltd., which admitted to paying or offering approximately $5.3 million in bribes to Bangladeshi government officials in order to obtain a mobile phone service contract. Apparently, DOJ has information that some of these funds remain in the Singaporean bank accounts through which they were funneled, and on January 8, DOJ filed an in rem forfeiture action in the U.S. District Court for the District of Columbia (No. 1:09-cv-021) to seize all assets in certain identified accounts located in Singapore.

**Conclusion**—2008 was another banner year for anti-corruption enforcement in the U.S. and elsewhere. Companies operating internationally and involved in international public procurement should ensure their FCPA compliance programs are robust and adequately protect against the risk of employees taking the expedient but improper course in the pursuit of new opportunities and business. With numerous rumored and expected cases in the pipeline, it is likely that enforcement will be even more strict and multinational in the future.

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