The New Era of FCPA Enforcement: Moving Toward a New Era of Compliance

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Abstract. The DOJ and the SEC are aggressively enforcing the FCPA in what has come to be called the New Era of FCPA enforcement.[1] *Those efforts are reflected by expansive interpretations of the statute, the increasing use of industry sweeps, spiraling costs to settle corporate cases and a focus on individuals, coupled with demands for longer prison sentences. This has spawned increasing demands for amendments to the statutes. Congress has considered the question but not acted. Enforcement officials could spur compliance by amending their prosecution guidelines to include items such as a compliance defense but have not. Yet business organizations and their employees remain at risk. To avoid or at least mitigate liability, business organizations need to step-up and implement reasonable compliance systems and begin a new era of compliance.*

I. Introduction.

It has been over thirty years since the U.S. became the first country to pass anti-corruption legislation known as the Foreign Corrupt Practices Act ("FCPA" or "the Act").[2] At the time, many thought that the Act would impede the ability of U.S. business to compete abroad.[3] Nevertheless, Congress wrote and passed the legislation, which was signed into law by President Jimmy Carter.

Passage of the Act was spurred by a series of "questionable payment" cases initiated by the Securities and Exchange Commission ("SEC" or "Commission") in the wake of the Watergate scandal. Those actions culminated with the Commission's highly effective "volunteer program," under which hundreds of corporations came forward and admitted foreign bribery.[4]

Following its passage, enforcement was not a priority.[5] In the late 1990s, however, other countries became signatories to the anti-bribery

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convention of the Organization for Economic Cooperation and Development ("OECD").[6] The FCPA was amended to conform to certain provisions of the convention.[7] Other signatories have enacted legislation to implement the policies and goals of the OECD convention.[8] One of the most stringent may be the U.K. Bribery Act which came into force July 1, 2011.[9]

Anti-corruption enforcement is increasing around the world.[10] In the United States, which continues to be the enforcement leader,[11] enforcement officials have declared "a new era of FCPA enforcement."[12] The "New Era" is evidenced by an increasing number of FCPA cases being brought by enforcement officials. It is also reflected in the increasing amounts being paid in settlement by business organizations and the spiraling cost of cooperating with government officials. There is a focus on individuals, a demand for longer prison sentences, and more cases going to trial.[13]

Business groups and others are demanding amendments to the FCPA as the New Era continues to unfold, claiming vague standards and policies hinder compliance and make enforcement inconsistent. Enforcement officials counter with claims that amendments are unnecessary. Nobody disagrees with the goal of the Act, which is to eliminate corruption from a segment of the world marketplace in order to create a level playing field where businesses compete on the merits.[14] Some, however, argue that the Act impedes the competitive position of U.S. business, a claim reminiscent of those made at the time of its initial passage.[15] Others argue that enforcement is overreaching, that key portions of the Act are undefined or vague, making compliance difficult and enforcement unfair, that compliance efforts are not given due recognition and encouragement and that key defenses have been all but eliminated.[16] Still others contend that New Era enforcement, with its reliance on non-prosecution and deferred prosecution agreements, is a façade.[17] Although Congress has held hearings to consider amendments, none have been enacted. Nevertheless, corruption cases continue to unfold while the drive for amendments continues unabated.

Few would argue that a New Era of FCPA enforcement has arrived. The real question, however, is whether it can be sustained and, ultimately, if the New Era is fostering the kind of effective compliance which is the ultimate goal of law enforcement. To assess this critical question, five key points will be examined: (1) FCPA investigations — creating a presence in the marketplace; (2) aggressive interpretations of the Act; (3) the spiraling cost of resolving FCPA cases; (4) prosecutions against individuals; and (5) the types of reforms being demanded, along with the position on those claims of enforcement officials. The conclusion analyzes the various trends, the calls for reform and offers

an approach for resolving the conflicts and facilitating effective enforcement.

II. FCPA Investigations — Creating a Presence in the Marketplace.

Enforcement officials have repeatedly touted their ability to conduct industry-wide inquiries, while encouraging self-reporting, cooperation and disclosure.[18] Creating a seemingly ubiquitous presence in the marketplace spurs compliance. Indeed, this is critical for law enforcement in view of its limited resources. Accordingly, FCPA enforcement officials have crafted over time a growing presence in the marketplace through pronouncements about industry-wide investigations and targeted sweeps. Those efforts have been aided by disclosures from issuers and the growing legion of whistleblowers.[19]

A. Industry-Wide inquiries and sweeps

Enforcement officials have over the years identified various industries to be scrutinized for possible FCPA violations. Probes into those industries are, in some instances, a proactive sweep which constitutes a kind of prospecting for fraud while in others they may have emanated from a specific lead or tip. In 2007, Department of Justice ("DOJ") officials identified several industries "of interest." Those included the banking, insurance, gaming, manufacturing and telecommunications industries.[20] In 2009, the DOJ added the pharmaceutical industry.[21]

Subsequently, FCPA actions have been brought against business organizations involved in the targeted industries. In the telecommunications industry, for example, actions were brought against Alcatel-Lucent S.A.,[22] Latin Node, Inc. and Veraz Networks, Inc.[23] An FCPA action was brought against investment fund Omega Advisors, Inc.[24] In the pharmaceutical industry, Johnson & Johnson, Inc. settled an FCPA inquiry,[25] while other probes reportedly are in progress. SciCone Pharmaceuticals, Inc. has reported that it received a subpoena from the SEC and a letter from the DOJ indicating its sales in foreign countries, including China, were being investigated.[26] Merck & Co., Inc., Astra Zeneca PLC, Bristol-Myers Squibb Company, and GlaxoSmithKline plc are also reportedly being scrutinized.[27]

In some instances, the existence of an industry-wide inquiry has emerged as settlements are announced, or the inquiries are disclosed by a company. Recent case settlements for example, with medical device manufactures *Biomet Inc.*,[28] *Smith & Nephew, Inc.*,[29] and AGA Medical,[30] coupled with comments by enforcement officials[31] confirm a sweep in that industry.

Other sweeps include one by the SEC targeting certain financial institutions and their dealings with sovereign wealth funds.[32] The

Commission also is reportedly conducting a sweep of Hollywood, probing the relationships between film studios such as 20th Century Fox, DreamWorks Animation and Disney with Chinese officials.[33] As that probe unfolds and others are initiated and continue, it is apparent that enforcement officials are focused on companies doing business in high risk venues.[34]

B. The Two Largest Industry-Wide Investigations.

Two large groups of cases are illustrative of the industry-wide investigations. One centers on the U.N. "Oil-For-Food Program." The other involves a series of cases focused on the oil services and freight forwarding business.

1. The U.N. "Oil-For-Food Program" Cases.

The Oil-for-Food Program FCPA cases are the largest "industry-wide" inquiry. That program emanates from an embargo the United Nations imposed on Iraq following its invasion of Kuwait in 1990. It was designed to alleviate hardship on the people of Iraq from the embargo by permitting the sale of oil and the purchase of humanitarian goods under the auspices of the United Nations.[35] Following widespread allegations of corruption in the program, an investigation was conducted and a report prepared by a commission chaired by former Federal Reserve Chairman Paul Volcker. The report identified 2,253 companies worldwide who made more than $1.8 billion in illicit payments to the Iraqi government.[36]

The DOJ and the SEC have brought a series of FCPA cases related to the program. The actions can be divided into those on the humanitarian and those on the oil sides of the program. On the humanitarian side, the cases typically involve the payment of a 10% surcharge demanded by the Iraq government. It was usually added to the contract price before the agreement was submitted to the U.N. for approval under the terms of the program.

The case against Italian manufacturer Fiat, S.p.A. is typical of those on the humanitarian side of the program.[37] Between 2000 and 2003, Fiat entered into a series of agreements with a value of over €46 million to sell industrial pumps, gears and similar equipment. Over $4 million in what were called "after sales service fees"—kickbacks—were added to the contract prices. The fees were not properly recorded in the books and records of the company.[38]

Fiat, whose ADRs were traded in New York until the company delisted in 2007, and its subsidiaries resolved the criminal inquiry by entering into a deferred prosecution agreement with the DOJ at the parent company level, coupled with guilty pleas by three subsidiaries. The parent company accepted responsibility for the acts of its subsidiaries, although it was not charged, and agreed to pay a $7 million

criminal fine.[39] Two subsidiaries pleaded guilty to charges of conspiracy to commit wire fraud and to violate the books and records provisions of the FCPA. A third pleaded guilty to a charge of conspiracy to commit wire fraud. The FCPA bribery provisions were not implicated because the payments went to the government of Iraq, not a "foreign official" as defined in the Act.[40] The settlement of the case was impacted by the cooperation of the company, as the DOJ acknowledged, which conducted a complete investigation and instituted certain remedial measures.[41]

Fiat also settled with the SEC. The parent company consented to the entry of a permanent injunction prohibiting future violations of the FCPA books and records provisions. It also agreed to pay disgorgement of about $5.3 million, prejudgment interest and a civil penalty of $3.6 million.[42]

Iraq also demanded kickbacks on the oil side of the program. In those cases, the improper payments were typically made by adding a surcharge to the price. The action involving Chevron Corporation is typical. From April 2001, to May 2002, the company purchased about 78 million barrels of crude oil from Iraq under 36 contracts with third parties. It paid about $20 million in surcharges or kickbacks to Iraqi's State Oil Marketing Organization or "SOMO." Before the purchases, Chevron learned about Iraq's demand for kickbacks. In January 2001, the company instituted a policy prohibiting the payment of surcharges and directing that traders obtain prior written approval from the Director of Global Crude Trading before any Iraqi oil purchase, as well as a management review of the proposed deal. Traders ignored the policy. Management routinely approved the purchases, although documents suggested it knew about the surcharges.[43]

Chevron resolved possible criminal charges by entering into a non-prosecution agreement with the U.S. Attorney's Office for the Southern District of New York ("USAO SDNY"), while simultaneously settling[44] with the SEC, the Office of Foreign Asset Control ("OFAC") and the New York County District Attorney's Office ("Manhattan DA"). In that settlement, the company agreed to make the following payments: (1) $20 million to the USAO SDNY (which was transferred to the Development Fund of Iraq); (2) $5 million to the Manhattan DA; and (3) a $2 million civil penalty to OFAC.[45] The USAO SDNY cited the cooperation of the company, which was considered in the overall settlement.[46]

To settle with the SEC, Chevron consented to the entry of a permanent injunction prohibiting future violations of the FCPA books and records and internal control provisions and agreed to pay disgorgement of $25 million, along with prejudgment interest and a penalty of $3 million. Those obligations were satisfied by the payments made to resolve the two criminal investigations.[47]

2. The Oil Services-Freight Forwarding Cases.

A second significant group of industry-wide actions focused on the oil services and freight forwarding industry. Six companies were involved: Panalpina Worldwide Transport (Holdings) Ltd. ("Panalpina"), Pride International, Inc. ("Pride"), Royal Dutch Shell plc ("Shell") Noble Industries, Inc. ("Noble"), Tidewater Inc. (Tidewater"), and Transocean, Inc. ("Transocean") and/or their subsidiaries.[48] The SEC also brought an action against GlobalSantaFe Corporation, which had merged into Transocean in 2007.[49]

The cases in this group trace to an earlier investigation, a sweep and two corporate whistleblowers. In 2007, the DOJ and the SEC settled actions with Vetco Gray Controls, Inc. and others. That inquiry involved bribes paid through the services of an international freight forwarding and customs clearing company in Nigeria where Panalpina conducted business and where most of the activities in this group of cases occurred.[50] Following the Vetco cases, the DOJ conducted a sweep of the oil services companies.[51] In addition, while under investigation for possible FCPA charges, Pride furnished enforcement officials with a substantial amount of information about Panalpina which, in turn, provided information on others as part of its cooperation efforts.[52]

Five of the six cases in this group involved, in part, bribes paid in Nigeria to customs officials relating to the development of Nigeria's first deep water oil drilling operation known as the Bonga Project.[53] The sole exception is the case involving Pride International, which is a Houston-based worldwide operator of offshore oil and gas drilling rigs. The charges in that action centered on claims that between 2003 and 2004 the company, through certain subsidiaries, branches, employees and agents, paid over $804,000 in bribes to, or for the benefit of, government officials in Venezuela, India and Mexico to extend drilling contracts, secure a favorable administrative decision relating to a customs dispute and avoid the payment of customs duties. Pride received at least $13 million in benefits. The bribes were improperly recorded in the books and records of subsidiaries, which were consolidated into those of the parent.[54]

The company settled with the DOJ, entering into a deferred prosecution agreement under which the company agreed to pay a fine of $32,625,000.[55] Its subsidiary, Pride Forasol, S.A.S., pleaded guilty to charges of conspiracy to violate, and violations of the anti-bribery provisions and aiding and abetting violations of the books and records provisions.[56] The DOJ considered the extensive cooperation of the company in resolving the case. That is reflected in the fine of $32,625,000, which is about half of the lower end of the sentencing guideline calculation.[57]

Pride International also settled with the SEC. The terms were substantially similar to those of the other cases in this group, except for Shell. The company consented to the entry of a permanent injunction prohibiting violations of the anti-bribery and books and records and internal control provisions of the FCPA and agreed to pay $23,529,718 in disgorgement and prejudgment interest.[58]

Panalpina was at the center of each of the other cases in this group. The company is a global freight forwarding and logistics services firm. Enforcement officials claimed it had a culture of corruption. Over a five-year period beginning in 2002, the company was alleged to have paid bribes to foreign officials valued at $49 million, including $27 million on behalf of U.S. customers. Bribes were also paid in six other countries to circumvent local rules regarding the import of goods and materials.[59] Panalpina settled with the DOJ, executing a deferred prosecution agreement in which it agreed to pay a $70.56 million fine, which was reduced from the guideline range based on cooperation.[60] The company also agreed to report to enforcement officials on its compliance efforts. Panalpina, Inc., the U.S. subsidiary and a domestic concern, pleaded guilty to charges of conspiracy to violate the books and records provisions and aiding and abetting certain customers in violating those provisions of the FCPA.[61] The settlement reflected what the DOJ called the "extensive cooperation" of the company.[62] That cooperation included furnishing information regarding others to enforcement officials.[63]

The U.S. subsidiary of the company settled with the SEC. It consented to the entry of a permanent injunction prohibiting future violations of the anti-bribery provisions and from aiding and abetting violations of the books and records provisions of the FCPA. It also agreed to pay $11,329,369 as disgorgement. This was an unusual case for the SEC since it did not involve a publicly traded company. It was based on claims that the company acted in conjunction with issuers.[64]

Shell Nigerian Exploration and Production Co. Ltd. ("SNEPCO"), a subsidiary of Royal Dutch Shell plc, whose ADRs were traded in New York, obtained what is perhaps the most favorable SEC settlement in this group. The action focused on the period March 2004 through November 2006 during the construction phase of the Bonga Project and the efforts by SNEPCO and others to explore and produce oil in the first deepwater project in Nigeria. The company paid over $2 million to subcontractors and agents for customs clearance services, knowing that some or all of the money paid through Panalpina was reimbursement for sums paid to Nigerian Customs Services to expedite the delivery of materials. Avoiding Nigerian duties, taxes and penalties resulted in a $7 million financial benefit to the company. The payments were not accurately reflected in the books and records of the company, which were consolidated with those of Royal Dutch

Shell.[65]

SNEPCO entered into a deferred prosecution agreement with the DOJ and agreed to pay a criminal penalty of $30 million. The agreement acknowledged the cooperation of the company. Noticeably missing, however, was any discussion of those efforts as in the Panalpina papers. Although the conduct here did not appear to be as extensive as in Panalpina, the fine was similar in that it was slightly below the bottom of the sentencing guideline range.[66]

To settle with the SEC, Royal Dutch Shell plc and its U.S. subsidiary, Shell International Exploration and Production Inc., consented to the entry of a cease and desist order prohibiting future violations of Exchange Act §§ 30A, 13(b)(2)(A) and 13(b)(2)(B) in a Commission administrative proceeding. The Respondents also agreed to pay $18,149,459 in disgorgement and prejudgment interest. The SEC did not mention the cooperation of the company. Yet, this was the only case in this group to be resolved with an administrative cease-and-desist order, rather than a Federal Court injunction. There was no discussion in the papers which indicated the basis for this settlement.[67]

Noble Corporation was the only company in this group to settle potential criminal liability with a non-prosecution agreement. According to the court papers, beginning in January 2003, and continuing through early 2007, whenever the temporary arrangement to have company drilling equipment in the country was about to expire, false paper work was submitted on Noble's behalf to Nigerian officials. This permitted Noble to maintain its equipment in the country and avoid paying duties as required by law. Payments were made to government officials in connection with these transactions. The overall benefit to the company was about $2,973,000.[68]

The non-prosecution agreement reflected the cooperation of the company, according to the DOJ: "The non-prosecution agreement recognizes Noble's early voluntary disclosure, thorough self-investigation of the underlying conduct, full cooperation with the department and extensive remedial measures . . ."[69] As part of that agreement, the company did, however, pay a $2.59 million criminal fine.[70]

In contrast, Noble settled with the Commission on the same terms as the other defendants in this inquiry, with the exception of Shell. The company consented to the entry of a permanent injunction prohibiting future violations of the anti-bribery and books and records and internal control provisions and agreed to pay disgorgement and prejudgment interest of $5,576,998.[71]

Like Noble, Transocean self-reported and cooperated. Unlike Noble, however, the company resolved the charges by entering into a deferred prosecution agreement rather, than a non-prosecution agreement.

Transocean is a Cayman Islands corporation with principal execu-