RECENT DEVELOPMENT

RECENT TRENDS IN FCPA ENFORCEMENT

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The United States has realized its interest in battling corruption worldwide and is using the energy industry to enforce United States corruption standards on the rest of the world. The Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) are using the Foreign Corrupt Practices Act (“FCPA”) to put foreign energy deals under greater scrutiny, particularly in transactions that involve government licenses. The energy sector is vulnerable to corruption because most of the world’s resources are located in developing countries that lack the infrastructure and controls needed to fight corruption and where government licenses, a likely conduit to corruption, are critical to profitable operations.1 This article first discusses the purpose of the FCPA and the powers it gives to regulate American companies doing business overseas. The article then covers how the FCPA is being used to apply more pressure to American companies. The article next presents potential areas where the FCPA will likely be used to combat corruption in the future. Finally, the article provides methods companies might use to protect themselves in the future.

FCPA: BACKGROUND

Congress originally enacted the FCPA as a reaction to the widespread practice of American businesses paying foreign

1. Palmina M. Fava, Energy Sector Faces Greater FCPA Scrutiny, OIL & GAS FIN. JOURNAL (2008). See also, Eugene S. Erbstoesser et al., The FCPA and Analogous Foreign Anti-bribery Laws, Oxford University Press (2007) (“The FCPA was adopted after more than 400 United States companies, including 117 members of the Fortune 500, admitted to more than $300 million in questionable payments to foreign officials.”).

2. Fava, supra note 1. See also, Renewable Energy Law Alert, Jan. 6, 2009, http://www.stoel.com/showalert.aspx?Show=3435 (“Siting, permitting, environmental review and enforcement, local community support, responding to RFP’s, negotiating and performing under power purchase agreements, conducting project build out, establishing generation interconnections and transmission tie-ins, obtaining transmission services, obtaining tax advantages or subsidies, and complying with safety and antitrust requirements; all of these aspects of an international energy company’s business, as well as other operations, often involve the discretion of a foreign official.”).
bribes. One of the major concerns voiced by Congress was the effect American corporations paying bribes has on the perception of America and the “financial integrity” of American businesses. The FCPA seeks to eliminate use of bribes to foreign officials by requiring companies, who have securities registered with the SEC, to keep detailed accounts of corporate payments and transactions, and maintain an accounting system which insures management’s control over the firm’s assets. The FCPA also prohibits any company, regardless of whether they have securities registered with the SEC, from making payments for “the purpose of obtaining or maintaining business.”

The FCPA is applicable to any person or organization that “command[s], authorize[s], or help[s] someone to violate the anti-bribery laws or conspire[s] to break those laws.” To fall under the FCPA, payments or gifts given to foreign official must be for the purpose of getting them to use their official capacity to effect or influence a decision or to assist the company in getting or keeping business. The duties of the foreign officer receiving the payment are not the crucial inquiry but rather the purpose of the payment. However, the FCPA only extends to payments made to “foreign officials, a foreign political party or party officials and/or any candidate for foreign political office.”

Individuals and companies who violate the FCPA are subject to both criminal and civil liability. Criminal penalties include fines up to $2,000,000 for a business and up to $100,000 and five years incarceration for an individual. Civil actions are usually brought by the SEC and range from a $10,000 fine for violating anti-bribery laws to the gross amount of the ill-gotten gain. In addition, any conduct which violates the FCPA can also set off a cause of action under the Racketeer Influenced and Corrupt

4. Id.
5. Id.
7. Id.
8. Id.
9. Id.
10. Id.
12. Id. (“The specific dollar limitations are based on the egregiousness of the violation, ranging from $5,000 to $100,000 for a natural person and $50,000 to $500,000 for any other person.”).
Organization Act which authorizes treble damages.\textsuperscript{13} Furthermore, the FCPA mirrors the Organization for Economic Cooperation and Development’s (“OECD”) convention on bribery which provides a closer set of standardized bribery laws.\textsuperscript{14} Overall, the amount of pressure put on companies or individuals in both the criminal and civil contexts makes most FCPA cases settle before going to trial.\textsuperscript{15}

**FCPA Enforcement Trends**

Between 1978 and 2000 the DOJ and SEC averaged only three FCPA prosecutions per year but since then prosecutions have accelerated at a rapid pace.\textsuperscript{16} Recent prosecutions have shown that the DOJ and SEC are increasingly likely to find violations where previously none existed and are willing to impose drastic fines for conduct that previously would have passed unnoticed.\textsuperscript{17} Several factors are spurring FCPA prosecutions by the DOJ and SEC. First, successor liability allows the FCPA to be used against an acquiring corporation that fails to perform satisfactory due diligence on their target corporation’s possible FCPA violations.\textsuperscript{18} Second, because the international energy environment is susceptible to corruption in ways other industries are generally not, the DOJ is conducting an industry wide probe of oil and gas service providers.\textsuperscript{19} Third, the international financial crisis has forced companies to seek alternative sources of investment, which make them vulnerable to new liability.\textsuperscript{20}

The DOJ is now targeting individual corporate officers even when their employer has already pled guilty.\textsuperscript{21} The books and

\textsuperscript{13} \textit{Id.} See also Nick Snow, \textit{Companies Take Steps to Avoid Bribe Hazards}, OIL \& GAS J., March 5, 2007, at 18 (“If you’re dealing with the FCPA, the chances of being also accused of violating the Money Laundering Control Act are substantial” which if violated is a twenty year offense and makes pleading to a lesser charge under the FCPA very attractive.).

\textsuperscript{14} \textit{Seitzinger, supra note 3, at 6.} The members of the OECD are Austria, Australia, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, New Zealand, The Netherlands, Norway, Portugal, Poland, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States.

\textsuperscript{15} \textit{Snow, supra note 13.}

\textsuperscript{16} \textit{Erbstoesser et al., supra note 1, The FCPA and Analogous Foreign Anti-bribery Laws, 2 Cap. Markets L.J. 381, 386 (2007).}

\textsuperscript{17} \textit{Id.}

\textsuperscript{18} Fava, \textit{supra note 1.}

\textsuperscript{19} \textit{Id.}


\textsuperscript{21} Erbstoesser et al., \textit{supra note 1, at 388.}
records provision of the FCPA which requires not only an objective description but also a tag indicating an improper payment has been used to pursue corruption. Another area the DOJ has focused on recently is the use of consultants who do not add any value to the business venture but must be used if a company wants to do business in a given location. In a recent online poll conducted by Delloite, respondents indicated they believed FCPA violations were most likely to occur in an agent/consulting relationship. The DOJ and the SEC are also placing a greater emphasis on the due diligence a company must conduct before acquiring a new business.

Acquisition due diligence is an ever more important focus of the FCPA because of the increasing level of cross-border mergers and acquisitions. Whenever a company acquires a foreign target, they expose themselves to two main risks: criminal and civil liability for the pre-acquisition conduct of the target company and the inability to adequately reform past bad business practices in time to avoid illegal payments post acquisition. Successor liability makes the structure of the corporate transaction a key issue. Under United States law, when a target is fully integrated into the acquiring company, the acquiring company assumes the liabilities of the target. However, if it is instead structured as an asset sale, no liability is acquired so long as the company continues to operate in “its separate existence.” Although the DOJ and SEC have targeted specific types of business transactions, they are also focusing on specific industries and regions of the world where corruption is most likely.

The focus of FCPA enforcement on international energy companies is not surprising considering the type of environment they must function in to remain profitable. In order to have a competitive advantage over their competitors, international

22. Id. (Payments to non-governmental officials can violate the FCPA when not accurately accounted for.)
23. Id. The DOJ’s action against Baker Hughes centered on them employing a consulting firm that did nothing for the business transaction except pay bribes to the Kazkhoil official.
24. Delloitte Poll: Less than One Third of Companies are increasing internal controls to prevent FCPA violations, PR NEWswire, April 17, 2008.
25. Erbstoesser et al., supra note 1, at 393. Vetco International Ltd was fined $26 million in 2007 after discovering an acquisition target in Niger was making improper payments and did not stop for several months even after they alerted the DOJ.
26. Id.
27. Id.
28. Id.
29. Erbstoesser et al., supra note 1, at 393
30. Id.
energy companies must obtain access to lower-cost resources than their competitors. Therefore, companies wishing to operate in resource-rich areas try to find ways to distinguish themselves from their competitors. Often, a relatively easy way to do this is by paying bribes in order to obtain the necessary government licenses for operations. Fortunately, most companies cannot undertake large overseas oil and gas deals without getting some help from Export Credit Agencies or Multi-lateral Agencies that require transparency in the deals.\textsuperscript{31} The World Bank’s insistence on transparency has been an important tool the United States has used to get other countries serious about anti-bribery laws.\textsuperscript{32} However, there is still a real problem with countries that are rich enough to not need money from international financial institutions, but are also developmentally poor.\textsuperscript{33}

\textbf{AREAS OF FOCUS FOR FCPA ENFORCEMENT}

Angola, Africa’s top oil producer, is the perfect example of a country rich in natural resources but lacking investment from international institutions. It has maintained “an opaque financial system rife with corruption.”\textsuperscript{34} History suggests that so long as countries need oil, they will continue trading with Angola despite its poor record with corruption and human rights.\textsuperscript{35} While many countries deal with Angola, perhaps the country most invested in Angola is China.\textsuperscript{36} Looking at Angola and China’s relationship, it is clear their antiquated systems allow them to thwart the goals of the rest of the world in combating corruption. China, as one of the strongest economic forces in the world, will have to play a huge role in standardizing corruption principles if we ever want to see a fully effective FCPA.\textsuperscript{37}

Most of China’s businesses remain partially state owned, meaning those doing business with them are dealing with foreign officials, which should instantly put a company on alert.\textsuperscript{38} This fact, in conjunction with the common practice of giving gifts and attending social events with customers and suppliers, and the

\begin{footnotes}
\footnote{31}{Snow, supra note 13.}
\footnote{32}{Id.}
\footnote{33}{Stephanie Hanson, Angola’s Political and Economic Development, COUNCIL ON FOREIGN RELATIONS, July 21, 2008, available at http://www.cfr.org/publication/16820/}
\footnote{34}{Id.}
\footnote{35}{Id.}
\footnote{36}{Id.}
\footnote{38}{Id.}
\end{footnotes}
less detailed system of accounting the Chinese use, increases the potential for corruption.\textsuperscript{39} Furthermore, businesses often form joint ventures or have an agent to help translate and navigate the foreign business structure, and this exposes them to liability for any violation of the FCPA by their agent, although it is unlikely the agent will have any real knowledge of the statute.\textsuperscript{40} These factors make it likely that many international businesses are not operating within FCPA guidelines.\textsuperscript{41} Therefore, as China catches up with the rest of the developed world with their corruption standards, it is very likely that the United States will be made aware of potential violations of the FCPA by companies operating there.\textsuperscript{42} Most likely, once it becomes clear to companies that China is going to be transparent as much of the rest of the world, the companies operating there will disclose their potential violations (or perhaps forgo violations altogether) to avoid the United States finding out through information sharing.\textsuperscript{43}

In addition to the DOJ targeting businesses that are operating in specific countries, the current financial crisis could actually lead to greater FCPA violations as companies look to alternative methods of investment.\textsuperscript{44} Any company that has gotten an investment from a sovereign wealth fund ("SWF") should be wary because the FCPA’s expansive definition of "foreign official" opens them up significant liability.\textsuperscript{45} Under the FCPA, the term “foreign official” encompasses “any business, as well as its representatives, that is managed by the investment arm of a foreign country or receives funding from a foreign countries investment fund.”\textsuperscript{46} This means that even if a corporation is just doing business with a client who has received investment from a SWF, the corporation could be liable under the FCPA.\textsuperscript{47} Expanding liability is a potentially disastrous trend for many companies that used to think they were insulated by being a solely domestic company.\textsuperscript{48} Instead of going after companies

\begin{itemize}
\item \textsuperscript{39} Id. “From a books and records standpoint, the Chinese system of receipts, fapiao, results in less detail than is customary under standard US practices”.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Fishman, supra note 34.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Fava, supra note 20.
\item \textsuperscript{45} Id. An SWF is a “state owned investment vehicle pooled from a foreign nation’s economic reserves.”
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id. “The entity receiving the SWF funding is treated as an agent of the foreign country for purposes of FCPA enforcement.”
\item \textsuperscript{48} Fava, supra note 20.
\end{itemize}
that do business unlawfully in foreign nations, as was traditionally the case, the DOJ can now go after a business that only operates on United States soil if they do business with someone receiving SWF funding. The problem with SWF funding is the potential for a quid pro quo relationship where a company accepts the funding solely to generate new business. In this new environment, it is important for any domestic issuer to know if any of its clients are receiving SWF funding. If this is the case, the domestic issuer needs to determine the extent to which the SWF exercises control over the client’s business.

LOOKING AHEAD AT FCPA ENFORCEMENT

Recent enforcement suggests that the DOJ is becoming less concerned with the degree of connection a given activity has with the United States and will seemingly pursue any foreign company they believe is acting as an agent for a US party. As more countries see the benefits of enforcing corruption standards, more businesses will be subject to penalties in multiple jurisdictions for violating anti-bribery laws. The DOJ and SEC believe disclosing a possible FCPA violation completely at an early stage is an important mitigating factor. Therefore, it seems prudent for companies to try to discover possible violations as early in a transaction as possible and address the issues before the transaction is finished. Corporations would also be well advised to have a comprehensive compliance program in place before beginning an international transaction. It is common for a business wanting to do transactions abroad to hire consultants who help navigate unfamiliar foreign business practices. When a consultant is involved, corporations would be prudent to include anti-bribery provisions in the consultant’s contract to help reduce the chances of an FCPA violation. Finally,

49. Id.
50. Id.
51. Id.
53. Id.
54. Id.
55. Id. (When a company finds potential violations and does not address them adequately the DOJ and SEC will consider the company’s failure to rectify the issues as an aggravating factor in their investigation.).
56. Witten & Parker, supra note 52.
57. Id.
58. Id. (Some examples of controls that should be implemented when using a consultant include: “a requirement that the company conduct and document thorough due
companies should be aware that there is no de minimis exception to the FCPA and even providing what is a routine payment in a foreign country can be an FCPA violation. 59 Furthermore, just because a practice is common in a given area, companies should be aware that this does not change the fact that it violates the FCPA and a company can be held liable for it. 60

The United States does not seem concerned with the unfortunate realities of what United States businesses face overseas, or at least, this does not stop the DOJ and SEC from aggressively prosecuting any business violating the FCPA. 61 Again and again, the DOJ and SEC have shown their willingness to apply criminal and civil charges against those who violate the FCPA. 62

The environment in which international energy companies must conduct business and the global interest in energy has made them the prime targets of those seeking to end corruption worldwide. Until the rest of the world and developing countries place the same emphasis the United States does on fighting corruption, energy companies will seemingly have a heavy burden in avoiding FCPA violations and prosecutions. However, energy companies should be aware that the United States has a clear stance: corruption is a top priority, and it will be prosecuted wherever it is found, even when ties to United States itself are tenuous.

diligence to uncover FCPA concerns, written contract have specific anti-bribery provisions, a prohibition against payments being made to parties in other countries other than the place of performance, require the consultant’s work to be precisely defined, and prohibit and payments to parties not listed under the contract.


60. Id.


62. Id.