FCPA: Cutting-Edge Issues in Global Anti-Corruption and Compliance

November 12, 2012
Speakers

• PANELISTS
  – Norman M. Brothers: Vice President, United Parcel Service, Inc.
  – Charles Duross: Deputy Chief of the Fraud Section in the Criminal Division of the Department of Justice
  – Paul T. Friedman: Partner, Morrison & Foerster LLP

• MODERATOR
  – Robert A. Salerno: Partner, Morrison & Foerster LLP
Presentation Overview

• What’s new? What’s changed?
• Spotlight on Individuals
• Buying Liability
• Is LatAm the New China?
• Minimizing Risks
What’s New?  What’s Changed?
Shift in Enforcement Priorities?

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(Through 6/30)
UK Bribery Act: One Year Later

- Act has been in effect for over a year
- To date, only one prosecution under the Act
- Anticipate more active enforcement
- Major impact: way in which companies approach compliance
- Adequate procedures
Status of DOJ Guidance?
Spotlight on Individuals
“One cornerstone of our FCPA enforcement policy [is] the aggressive prosecution of individuals. Put simply, the prospect of significant prison sentences for individuals should make clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations. As we focus on the prosecution of individuals, we will not shy away from tough prosecutions, and we will not shy away from trials. We are ready, willing, and able to try FCPA cases in any district in the country—as we demonstrated with our three FCPA trial victories just last year.”

- Assistant Attorney General Lanny A. Breuer, February 25, 2010
## Enforcement Successes

<table>
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<tr>
<th>Name</th>
<th>Jail Time</th>
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<td>Joel Esquenazi, Terra Telecomm. Corp.</td>
<td>15 years (Convicted after trial; on appeal)</td>
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<td>Charles Paul Jumet, Ports Engineering Consult. Corp.</td>
<td>7.25 years (Plea)</td>
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<tr>
<td>Carlos Rodriguez, Terra Telecomm. Corp.</td>
<td>7 years (Convicted after trial; on appeal)</td>
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<td>Douglas Murphy, American Rice, Inc.</td>
<td>5.25 years (Convicted after trial)</td>
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<td>Juan Diaz, JD Locator Services</td>
<td>4.75 years (Plea)</td>
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<tr>
<td>Shu Quan-Sheng, AMAC Int’l. Inc.</td>
<td>4.25 years (Plea)</td>
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FCPA Trials

• Shot Show Cases
• Lindsey Manufacturing
• Wooh
• O’Shea
Buying Liability
Successor Liability

• M&A transaction does not terminate liability for past conduct of acquired entity

• Acquirer can be held liable under theories of successor liability

• There is no sure-fire “structural solution” to avoid all FCPA liability; stock purchases, mergers, and asset purchases can all lead to liability

• Target’s inaccurate accounting records may result in liability under the FCPA’s books and records provision
Investment Sufficient; Not Just Acquisitions

• “Active management” or “actual control”
  • Degree of control
  • Role as Boardmember

• Majority investment = presumption of control
• Majority investment not necessary to trigger liability
• Passive investment is not a defense
Mitigate Risks

• Due diligence is not a defense to successor liability
• But due diligence can minimize risks of liability
• Consider need for pre-acquisition diligence
• Consider need for post-acquisition diligence and remediation
• Work should be done “as soon as practicable”
Not Just Legal Exposure

• Important to consider not only legal exposure

• Cost of:
  – Investigation
  – Remediation

• Erosion of value of investment

• Reputational harm
Is Latin America the New China?
LatAm Economic Trends

• Multinational companies experienced great difficulties/set-backs with investments in China

• Significant investment opportunities in LatAm region

• Region viewed as attractive for foreign investment

• Role of current or former state-owned enterprises + regulatory environment

• Where money flows, so does enforcement scrutiny
LatAm Corruption Perceptions Index

By comparison:

CPI Range in **China** = 3.2 – 4.1
CPI Range in **Mexico** = 2.8 – 3.2
CPI Range in **Argentina** = 2.6 – 3.3
CPI Range in **Venezuela** = 1.7 – 2.1
Minimizing Risks
Best Practices for Compliance

• Understand organization

• Conduct risk assessment
  – Regulatory guidance
  – U.S. Sentencing Guidelines
  – UK Ministry of Justice Guidance on “Adequate Procedures”

• Establish tailored program for anti-corruption compliance
  – Internal controls in place
  – Ready to address allegations of corruption
  – Structure to implement remediation steps
Effective Compliance Program

• Standards and procedures
• Board oversight/leadership
• Communications and training
• Auditing and monitoring
• Reporting concerns
• Responding to allegations
• Incentives and discipline
Encouraging Internal Reporting

• Knowing that a real and effective system is in place will give comfort to potential whistleblower

• Once report is made, it should be taken seriously and investigated promptly

• To the extent possible, inform whistleblower that company is investigating allegation

• Investigate fairly

• A credible investigation will give employees confidence that company takes allegations seriously and can handle complaints internally
The Toughest Question

• Deciding whether or not to self-report
  – Regulators claim there are benefits to self-reporting FCPA violations
  – Commentators debate whether such benefits exist
  – Many of the highest fines resulted from self-reporting
  – Used to be the obvious choice
  – Now some companies are choosing not to pick up the phone
  – The key: thorough and thoughtful remediation
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