Doing Business in Foreign Countries: Enforcement of Anti-Corruption Laws in Agribusiness

October 24, 2013

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Topics To Be Discussed

- Overview of the Foreign Corrupt Practices Act
- FCPA liability for the agribusiness industry
- Recent enforcement actions
- Identifying FCPA risk
- Mitigating risk

OVERVIEW OF THE FOREIGN CORRUPT PRACTICES ACT

Number of FCPA Enforcement Actions

Year	DOJ Prosecutions	SEC Prosecutions
2013	14	4
2012	11	12
2011	23	25
2010	48	26
2009	26	14
2008	20	13
2007	18	20
2006	7	8

Top 10 FCPA Enforcement Actions

- Siemens (2008): $800 million
- KBR / Halliburton (2009): $579 million
- Total S.A. (2013): $398 million
- Snamprogetti Netherlands B.V. / ENI S.p.A. (2010): $365 million
- Technip S.A. (2010): $338 million
- JGC Corp. (2011): $219 million
- Daimler AG (2010): $185 million
- Alcatel-Lucent (2010): $137 million
- Magyar Telekom / Deutsche Telekom (2011): $95 million

What Is The Foreign Corrupt Practices Act?

- Enacted in 1977 in the wake of reports that numerous U.S. businesses were making large payments to foreign officials to secure business.

- **Anti-Bribery Provisions**: Prohibits corruptly giving, promising, or offering anything of value to a foreign government official, political party, or party official with the intent to influence that official in his or her official capacity or to secure an improper advantage in order to obtain or retain business.

- **Accounting Provisions**: Requires issuers to maintain accurate "books and records" and reasonably effective internal controls.

Who Is Covered By The FCPA?

- **Issuers**: Any company whose securities are registered in the United States or that is required to file periodic reports with the SEC.

- **Domestic Concerns**: Any individual who is a U.S. citizen, national, or resident of the United States, or any business organization that has its principal place of business in the United States or which is organized in the United States.

- FCPA also applies to officers, directors, employees, and agents acting on behalf of issuers and domestic concerns.

- **Other Persons**: Anyone who takes any act in furtherance of a corrupt payment while in the United States.

Who is a “Foreign Official”?

- Any officer or employee (including low-level employees and officials) of a foreign government or any department, agency, or instrumentality of the government.
  - DOJ and the SEC have interpreted “instrumentality” broadly to include any state-owned or state-controlled enterprise (e.g., state-owned racing authority, electricity commission, telecommunication company, hospitals).
- Officers and employees of public international organizations (e.g., United Nations, World Bank, Red Cross).
- Party officials and political candidates.
- Members of royal families.

What is a “Thing of Value”?

- Anything a recipient would find interesting or useful:
  - Cash
  - Gifts
  - Meals / entertainment / travel
  - Company stock
  - Employment
  - Education expenses
  - Discounts on products or services
  - Payment for services not actually provided
  - Charitable contributions

- No de minimis exception

Proof of “Corrupt” Intent is Required

- Offer, payment, promise or gift intended to induce the person who receives it to misuse his official position for the benefit of the payer, payer’s client, or payer’s employer

- Focus is on intent
  - Success not required
  - Identity of bribe recipient need not be known (e.g., “bribe whoever you need to”)

FCPA Penalties – Corporations

- ***Criminal***:
  - <u>Bribery</u>: $2 million per violation
  - <u>Books and records</u>: $25 million per violation (raised from $2.5 million in 2002 by SOX)
  - Fines as high as twice the benefit the company sought to obtain

- ***Civil***:
  - <u>Bribery</u>: $16,000 per violation
  - <u>Books and records</u>: $725,000 per violation
  - Potential disgorgement of profits to SEC

FCPA Penalties – Individuals

- ***Criminal***:
  - Bribery: 5 years in jail and $100,000 per violation
  - Books and records: 20 years in jail and $5 million per violation (raised from 10 years and $1,000,000 in 2002 by SOX)
  - **Statute of limitations**: five years (but conspiracy can bring in older misconduct)

- ***Civil***:
  - Bribery: $16,000 per violation
  - Books and records: $150,000 per violation
  - Potential disgorgement of profits to SEC

Exceptions and Affirmative Defenses

- Facilitating and expediting payments
  - Small sums paid to facilitate routine, non-discretionary functions (processing of permits, licenses, visas, work orders; providing police protection, power/water supply)
  - Do not include payments related to decisions by foreign officials to award new business or continue business

- Payments expressly permitted by written local laws

- Reasonable and bona fide expenditures for demonstrating a product or performing a contractual obligation
  - Must be directly related to explanation, promotion, and demonstration of a product or service
  - Cannot be a disguise to provide compensation for help in securing business
  - Compare proposed government expenses to their own employee travel reimbursement policies – approve only those that are consistent with employee travel policies

THEORIES OF FCPA LIABILITY AGAINST COMPANIES IN THE AGRIBUSINESS INDUSTRY

Direct Liability – Anti-Bribery Provision

- Solicitation of foreign investment
  - Pension funds, large institutional investors and sovereign wealth funds may be considered instrumentalities of the government – employees could be considered “foreign officials.”
  - Be careful about gifts, travel, entertainment, and commissions.

- Contacts with foreign officials via subsidiaries
  - Emerging markets where payments to foreign officials are considered “customary” or “expected.”
  - Direct participation or control over subsidiary.
  - Tyson Foods, Walmart, etc.

Liability for Third Parties / Intermediaries

- Approximately 90% of FCPA enforcement actions based on liability of third party conduct
  - "Knowledge" = awareness of facts suggesting high probability that an improper payment would be made, offered, or promised by third party acting on behalf of the firm.

- Some common red flags include:
  - Agent resides outside the country where services are to be rendered
  - Requests for payment in cash
  - Requests for substantial up-front fee
  - Refusal to disclose identity of sub-agents who assist in his or her work
  - Refusal to sign anti-corruption representations, warranties, covenants
  - Close ties with foreign official
  - Commissions that are greater than what is typical within industry and region

Joint Venture / Successor Liability

- Joint venture liability
  - Activities of joint venture imputed to all members of the venture, irrespective of ownership
  - TSKJ joint venture – $1.7 billion in penalties
- Successor liability
  - Acquiring company generally inherits legal liabilities of acquisition
  - <u>Mitigating strategies</u>: pre- and post-acquisition due diligence; robust compliance program; alert government to undetected issues

Accounting Liability

- Applies to issuers (SEC filers)

- Two components:
  - **Books and Records:** mischaracterizing foreign bribes in company's books and records
  - **Internal Controls:** failure to maintain proper controls ensure accuracy of financial statements

- Parent may be liable for subsidiary's financial statements that are incorporated into parent's
  - Liable for subs for which parent has greater than 50% ownership
  - Unclear the liability for subs for which parent has less than 50% stake – must use "best efforts" to devise minority-owned sub to maintain system of internal accounting controls consistent with parent's.

FCPA MATTERS IMPACTING AGRIBUSINESS INDUSTRY

Tyson Foods

- In 2011, Tyson Foods paid $5.2 million to resolve charges with DOJ and SEC.
- Charges related to conduct at Tyson’s wholly-owned Mexican subsidiary.
  - Payments exceeding $100,000 made by unnamed individuals from Tyson’s Mexican subsidiary to Mexican inspectors to certify exports of processed chicken.
  - Payments in form of direct payments and no-show contracts for inspectors’ wives.
- Payments to wives were caught by Tyson Foods Intl in 2004, but payments to inspectors continued for another 2 years
  - Committee of high-level executives formed to keep the payments secret

Tyson Foods (cont'd)

- Lessons Learned
  - The cover-up is worse than the crime – payments to the inspectors totaled only $100,000, but total fines exceeded $5 million
  - Self-disclosure is worth it
    - Company eventually reports itself, and DOJ agrees to a 2-year Deferred Prosecution Agreement

Archer Daniels Midland

- On November 5, 2012, ADM disclosed in SEC filing that it had initiated discussions with DOJ and SEC to resolve FCPA matters
  - Relating to grain and feed exports.

- In May 2012, ADM disclosed that it had set aside $25 million in reserves to resolve monetary penalties associated with the FCPA matters

- In August 2012, ADM raised its reserves to $54 million to resolve the FCPA issues

IDENTIFYING AREAS OF FCPA RISK

Geography

- Transparency International's Corruption Perception Index (ranks 176 countries)
  - Brazil – #69
  - China – #80
  - India – #94
  - Mexico – #105
  - Russia – #133
  - Nigeria – #139

Business Model

- Significant use of third party agents
- Substantial revenue derived from foreign government or instrumentality
- Substantial system of regulatory approval (e.g., need for licenses and permits in foreign countries)
- High amount or frequency of claimed discounts, rebates, or refunds in foreign countries

Internal Controls

- Weak corporate compliance program and culture
- Poor or non-existent anti-corruption / FCPA training
- In-country managers who appear uncommitted to anti-corruption laws or the FCPA
- History of prior government anti-corruption / FCPA investigations

COMPLIANCE MEASURES

Hallmarks of an Effective Compliance Program

- Senior management commitment and clear policy
  - Creation of a "culture of compliance"
- Code of conduct and compliance procedures
  - Clear and easily understandable
  - Details regarding compliance responsibilities, internal controls, auditing practices, documentation policies, and disciplinary procedures
- Oversight, autonomy, and resources
  - Identify specific individuals with compliance responsibilities
  - Provide adequate authority and autonomy
- Risk assessment
  - Realistic assessment of risk given industry, country, and transaction type
  - Government will give greater cooperation credit

Hallmarks of an Effective Compliance Program

- Training and continuing advice
  - Identify appropriate personnel
  - Periodic supplemental training
- Incentives and disciplinary measures
  - Compensation tied to compliance
  - Escalating discipline up to and including termination
- Third-party due diligence
  - Risk-based approach
- Confidential reporting and internal investigation
  - Eliminate fear of retaliation
  - Consider prompt reporting of identified problems
- Regular review, testing, and improvement
  - Evolving to meet new risks

QUESTIONS?

Presenter

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