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A Year in FCPA

Investigations and prosecutions were revved up in 2011, resulting in numerous settlements and verdicts, explains Bethany Hengsbach of Sheppard Mullin.

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The U.S. government continued to enforce the Foreign Corrupt Practices Act with vigor in 2011. The year also brought the first judicial guidance on the interpretation of who qualifies as a foreign official under the FCPA, and several notable trials of those accused of violating the statute. This increased anti-corruption enforcement activity, along with the recent developments in the law, mandate that private and public companies alike remain vigilant in their FCPA compliance efforts.

INTERPRETATION OF 'FOREIGN OFFICIAL'

The anti-bribery provisions of the FCPA prohibit the making of payments to a "foreign official" for the purpose of obtaining or retaining business. 15 U.S.C. §78dd-2(a)(1). "Foreign official" is defined as "any officer or employee of a foreign government or any department, agency or instrumentality thereof." 15 U.S.C. §78dd-2(h)(2)(A). However, what constitutes a "foreign official" in practice has been the subject of considerable debate.

In *United States v. Aguilar*, the U.S. District Court for the Central District of California outlined an analytical framework to identify foreign officials for purposes of the FCPA. Under *Aguilar*, whether an entity constitutes a foreign official (or instrumentality thereof) depends on the nature and characteristics of that entity, specifically whether: (1) the entity provides a service to the citizens of the jurisdiction; (2) the key officers and directors of the entity are government officials or appointed by government officials; (3) the entity is financed through government appropriations or through revenues obtained as a result of government-mandated taxes, fees or royalties; (4) the entity is vested with and exercises exclusive or controlling power to administer its designated functions; and (5) the entity is widely perceived to be performing governmental functions.

FCPA TRIALS

Three noteworthy FCPA cases went to trial in 2011: *Aguilar*, the first FCPA criminal prosecution against a corporation to proceed to a jury trial, *United States v. Goncalves* and *United States v. Esquenazi*.

'AGUILAR'

In *Aguilar*, the Department of Justice alleged that Lindsey Manufacturing Co.'s outside sales

representatives in Mexico, Enrique and Angela Aguilar, bribed officials of Mexico's state-owned electric utility, Comision Federal de Electricidad to secure contracts for LMC. Prosecutors pointed out that the 30 percent commission paid to the Aguilars was significantly higher than the commission LMC's previous Mexican sales representative had received. They also noted that CEO Keith Lindsey and CFO Steve Lee had previously complained to CFE that contracts were being awarded on the basis of bribes and hired the Aguilars only after being told they might have a corrupt relationship with a CFE official. On May 10, a jury convicted LMC, Lindsey and Lee (the Lindsey defendants) on one count of conspiracy to violate the FCPA and five counts of FCPA violations.

However, on Dec. 1, 2011 the court vacated the conviction of the Lindsey defendants and dismissed the indictment against them with prejudice, on grounds of prosecutorial misconduct. The court pointed to a "sloppy, incomplete and notably overzealous investigation," and found that the government had testified untruthfully before the grand jury, inserted material falsehoods into affidavits in support of applications for search warrants, and recklessly failed to comply with its discovery obligations.

'GONCALVES' (SHOT SHOW) TRIAL

In January 2010, the FBI raided the Shooting, Hunting, Outdoor Trade convention in Las Vegas and arrested 22 individuals following an undercover sting operation in which agents posed as officials from an African country and solicited \$1.5 billion in bribes in exchange for defense contracts worth \$15 billion. The first four defendants were tried this summer, and a mistrial was declared when the jury could not reach a verdict after six days of deliberation. The jury's unwillingness to convict may have been in response to the entrapment defense posed by the defendants. The defendants showed that the government avoided using words such as "bribe" or "kickback" throughout the sting operation, and falsely assured defendants that the transaction had been vetted by the U.S. State Department when they questioned whether or not it was legal.

'ESQUENAZI'

In *Esquenazi*, the DOJ alleged that Joel Esquenazi and Carlos Rodriguez, president and vice president, respectively, at Terra Telecommunications Corp., paid more than \$800,000 to shell companies to bribe officials at Telecommunications D'Haiti for preferred telecommunications rates. In August of 2011, Esquenazi and Rodriguez were convicted on one count of conspiracy to violate the FCPA, seven counts of FCPA violations and 12 counts of money laundering. They were sentenced to 15 years and seven years in prison, respectively. Esquenazi's 15-year sentence is the longest in FCPA history.

ENFORCEMENT ACTIONS

Despite the notable trials of 2011, settlements are still the primary means of resolving FCPA enforcement actions, particularly against corporations. A survey of this year's settlements shows the focus with which federal regulators are enforcing the FCPA.

In January 2011, Maxwell Technologies Inc. paid \$14 million to settle charges that its Swiss subsidiary paid \$2.5 million in kickbacks through an agent to a Chinese state-owned utility

company. The Securities and Exchange Commission criticized the company's internal controls as "wholly inadequate," noting that its code of conduct included only a brief FCPA section, the company failed to conduct due diligence on the agent responsible for the payments, and the company failed to provide anti-corruption training to those involved in the payments.

In April 2011, JGC Corp. paid \$220 million to settle FCPA charges levied by the DOJ. JGC was part of a Nigerian joint venture that allegedly paid \$200 million to intermediaries with knowledge that at least some of the money would be used to bribe Nigerian officials to award the joint venture engineering and construction contracts worth \$6 billion.

Also in April, Converse Technology Inc. paid \$2.8 million to settle FCPA charges levied by the DOJ and SEC. CTI's Israeli subsidiary allegedly bribed individuals connected to OTE, a Greek telecommunications provider in which the Greek government holds a one-third interest.

In May 2011, Rockwell Automation Inc. paid \$2.5 million to settle FCPA charges brought by the DOJ and SEC. A Rockwell subsidiary in China paid \$615,000 to Chinese design institutes. The SEC noted that the design institutes provided legitimate services in return for the payments but alleged that Rockwell intended for the payments to influence the awarding of contracts by state-owned end users over which the design institutes held sway.

Also in May, Tenaris S.A. paid \$8.9 million to settle charges that it paid officials of an Uzbekistan state-controlled oil company for competitors' bid information. The SEC stated that the company's immediate self-reporting, full cooperation with the government and enhancements to its compliance program made it an appropriate candidate for the SEC's first deferred prosecution agreement.

Last year also brought noteworthy settlements in the pharmaceutical and life sciences industry. In April, Johnson & Johnson agreed to pay \$78 million in settlement with the DOJ and the SEC. J&J subsidiaries allegedly paid public health workers in Greece, Poland and Romania to induce the purchase of J&J medical devices and paid kickbacks to Iraq to obtain Oil-for-Food contracts. In November 2011, Pfizer Inc. revealed that it has agreed in principle to pay \$60 million to settle FCPA charges levied by the DOJ and SEC. The DOJ and SEC have not yet issued a release detailing the settlement. However, Pfizer has reportedly admitted to making "improper payments" outside of the U.S. These settlements reflect the government's focus in recent years on the pharmaceutical and life sciences industry.

The government maintains that a company's internal controls, self-reporting and cooperation with the government can help to reduce its liability under the FCPA. Bridgestone Corp.'s September 2011 settlement with the DOJ and SEC for \$28 million serves as one such example. Bridgestone was charged with having conspired to make corrupt payments to government officials in various Latin American countries to obtain and retain business. Bridgestone voluntarily conducted a worldwide internal investigation, made employees available for interviews, and collected, analyzed and provided voluminous evidence to the DOJ. In addition, Bridgestone undertook extensive remediation efforts, including restructuring the relevant parts of its business, terminating many of its third-party agents, and taking disciplinary action against the employees responsible for many of the corrupt payments. As a result, according to the DOJ, Bridgestone's fine was substantially reduced.

IMPACT OF FCPA DEVELOPMENTS ON COMPLIANCE

There are no signs that the government's increased FCPA enforcement efforts will slow down in 2012. Companies should therefore ensure their compliance programs are rigorous and reflect recent developments. In its deferred prosecution agreement with J&J, the DOJ signaled that (at least for J&J) a rigorous compliance program includes: (1) a clear policy against violations of the FCPA; (2) standards and procedures designed to reduce the prospect of FCPA violations; (3) mechanisms to ensure that FCPA policies, standards and procedures are communicated to employees, agents and business partners; (4) a system for reporting suspected violations of FCPA policies, standards and procedures, (5) due diligence requirements pertaining to oversight of agents and business partners; and (6) periodic testing of the compliance program to ensure its effectiveness.

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