Alien Tort Statute and Foreign Corrupt Practices Act:
Potential Liability from Operations Abroad:
Alien Tort Statute Liability Update

Presented by:
Raymond G. Mullady, Jr.
Headlines

• “Second Circuit’s Kiobel decision may end ATS lawsuits against corporations; Supreme Court review likely”
• “Corporate officials may be new targets of ATS suits”
• “Sensitivity to corporate social responsibility remains heightened; transnational companies operating in developing countries advised to step up due diligence”
Kiobel

  – Three-judge panel of 2d Circuit ruled that corporations, in contrast to individuals, are not liable under ATS for violations of international law
  – *Kiobel* may signal end to human rights lawsuits against multinational corporations in U.S. federal courts under the ATS
Kiobel

• The *Kiobel* Ruling

  – Suit brought against RDP and related Shell oil companies in 2002 by Nigerian villagers alleging that Shell aided and abetted acts of murder, rape and looting by Nigerian government

  – Second Circuit dismissed case, holding that “corporate liability is not a discernable – much less universally recognized – norm of international law that we may apply pursuant to the ATS”
The *Kiobel* Ruling

“Looking to international law, we find . . . that offenses against the law of nations (i.e., customary international law) for violations of human rights can be charged against States and against individual men and women but not against juridical persons such as corporations. As a result, although international law has sometimes extended the scope of liability for a violation of a given norm to individuals, it has *never* extended the scope of liability to a corporation.” Slip op. at 9 (emphasis in original).
The *Kiobel* Ruling

- Concurring opinion – Judge Pierre Leval
  - Concurred in dismissing case, but on 12(b)(6) (not jurisdictional) grounds
  - Disagreed that international law does not allow a U.S. court to impose ATS liability on a corporation
  - Lamented that “majority’s rule conflicts with two centuries of federal precedent on the ATS, and deals a blow to the efforts of international law to protect human rights”
Alien Tort Statute –

“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States. “
Background on ATS

• Enacted in 1789 as part of the first Judiciary Act; text has remained almost unchanged since that time

• ATS laid dormant for over 170 years
  – Judge Friendly called it a “legal Lohengrin” – “no one seems to know whence it came.” *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975)(Friendly, J.)

• Almost no legislative history
  – ATS apparently intended to allow federal courts to hear violations of customary international law such as piracy and assaults on foreign ambassadors
Background on ATS

• ATS given new life in 1980, when 2d Cir. decided *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)
  – Paraguayan sued former Paraguayan official under ATS for acts of torture and murder in violation of international law
  – Court held that ATS provides jurisdiction over (1) tort actions, (2) brought by aliens only, (3) for violations of the law of nations (also called “customary international law”) including war crimes and crimes against humanity
Background on ATS

• *Filartiga* – the first of more than 100 suits for human rights violations filed in U.S. district courts over last 30 years

• Two categories of ATS suits:
  • Against foreign government officials for alleged human rights abuses committed while in government
  • Against U.S. and foreign companies for “aiding and abetting” human rights violations by foreign governments in the countries in which the companies operated
### Corporations Facing ATS Litigation Since *Filartiga*

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<thead>
<tr>
<th>Company</th>
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<td>ArcherDaniels Midland</td>
<td>Ivory Coast</td>
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<td>Cargill</td>
<td>Ivory Coast</td>
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<td>Caterpillar</td>
<td>Israel (Gaza)</td>
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<td>Coca-Cola</td>
<td>Columbia</td>
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<td>Dow Chemical</td>
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<td>Eli Lilly</td>
<td>Brazil</td>
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<td>ExxonMobil</td>
<td>Indonesia</td>
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<td>Firestone</td>
<td>Liberia</td>
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## Corporations Facing ATS Litigation Since *Filartiga*

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<tr>
<td>Nestle</td>
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<td>Occidental</td>
<td>Columbia</td>
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<td>Pfizer</td>
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<td>Shell</td>
<td>Nigeria</td>
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<td>Talisman</td>
<td>Sudan</td>
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<td>Unocal</td>
<td>Burma</td>
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<td>Yahoo!</td>
<td>China</td>
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Corporations Facing ATS Litigation Since *Filartiga*

• The good news . . . no ATS suit has resulted in a monetary judgment against a major multinational corporation
  – Although several large companies have reached settlements (Unocal, Yahoo!, Shell)
  – And other cases have been mired in litigation for years at enormous financial cost and burden to the companies
Defenses to ATS Claims

• Three major categories:
  – Jurisdiction and justiciability
    • Personal & subject matter jurisdiction
    • Political question doctrine
  – Immunity and other preliminary issues
    • FSIA
    • Forum non conveniens
  – Liability of non-state actors
    • E.g., on theories of aiding and abetting and accessorial liability, conspiracy, and joint criminal enterprise

• U.S. Supreme Court directly addresses ATS for the first time
• Court dismisses ATS suit for arbitrary detention filed by Mexican national abducted at direction of U.S. government and brought back to U.S. for trial
• Decision reaffirms basic availability of the statute
• But doesn’t address all ATS issues and opens up a number of new questions
Key aspects of *Sosa*:

- Justice Souter opinion
- Concurred in by all 9 justices
- Federal courts should use “great caution” in allowing private plaintiffs to bring civil suits for violations of international law
- ATS suits should be limited to law of nations violations that existed in 1789 (piracy, assaults against ambassadors, violations of safe passage) and a “modest number” of other offenses on norms of international character accepted by the civilized world (e.g., torture)
Post-Sosa ATS Litigation

Key cases:

- *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.2d 244 (2d Cir. 2009), *cert. denied*, No. 09-1262 (2010)

- *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009)

Post-Sosa ATS Litigation

• *Presbyterian Church* – court held that Talisman *had to have intended* the human rights abuses alleged, not just had knowledge of them

• *Sinaltrainal* – court held that corporations may be liable under ATS, citing prior 11th Circuit decisions holding that the text of the statute provides no exception for corporations, e.g., *Romero v. Drummond Co., Inc.*, 552 F.3d 1303 (11th Cir. 2008)

• *Kiobel* – no corporate liability under ATS
Environmental Claims Under the ATS

• “[P]laintiffs’ imaginative view of this Court’s power must face the reality that United States district courts are courts of limited jurisdiction. While their power within those limits is substantial, it does not include a general writ to right the world’s wrongs.”

Environmental Claims Under the ATS

- Courts have recognized the potential for ATS liability for environmental torts, but no ATS plaintiff alleging an environmental violation of the laws of nations has prevailed.

- “[F]ederal courts . . . exercise extreme caution when adjudicating claims under [the ATS] to insure that the environmental policies of the [U.S.] do not displace the environmental policies of other governments.” Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167 (5th Cir. 1999)
Chemical Tort Claims Under the ATS

• Chemical companies operating abroad are susceptible to ATS liability for the effects their products have on local populations or environments when those effects are severe enough to violate the laws of nations

**Kiobel – Supreme Court Bound?**

- Plaintiffs have requested en banc review by 2nd Circuit; if review granted, decision by the full court would come in 2011
- Circuit split on issue of corporate liability – 11th (Sinaltrainal) vs. 2nd (Kiobel) may prompt review
- Jurisdictional issue also appealing – would guide lower courts in deciding ATS cases at an early stage
Post-Kiobel Jurisprudence

  
  Following *Kiobel*, held that ATS cannot provide federal court jurisdiction over claims based on voluntary actions taken by a corporation; action against Eli Lilly for injuries allegedly caused by environmental pollution in Brazil dismissed.
Post-Kiobel Jurisprudence

  - **Merits** dismissal of ATS against Firestone for injuries to Liberian children allegedly caused by forced child labor
  - By reaching the merits, *Flomo* is in line with Judge Leval’s concurring opinion in *Kiobel*
ATS Liability – What’s Ahead?

• “We note only that nothing in this opinion limits or forecloses suits under the ATS against the individual perpetrators of violations of customary international law – including the employees, managers, officers, and directors of a corporation – as well as anyone who purposefully aids and abets a violation of customary international law.”

  – Kiobel, slip op. at 11
ATS Liability – What’s Ahead?

• Thus, even if *Kiobel* is affirmed by Supreme Court, ATS suits likely will continue
  
  
  – Against individual corporate officials (officers, directors, managers) for aiding or abetting human rights abuses by foreign governments
ATS “Take-Aways”

• We live in an age of heightened sensitivity to corporate social responsibility

• Transnational companies must be sensitive to the impact of their products and activities on local populations
  – Detailed guidelines of good human rights practices for corporations are being developed by international initiatives, e.g., ISO, OECD
ATS “Take-Aways”

• Due diligence is key!

• Corporations should review activities in less-developed countries, establish internal rules, and have systems in place to audit their activity

• Outside counsel experienced in compliance matters can and should assist
Thank You!

Copies of the presentations and supplemental material can be downloaded at www.BlankRome.com/ChemCLE
Foreign Corrupt Practices Act (“FCPA”) Overview

Presented by:
Shawn M. Wright
Blank Rome Government Relations
“Did you notice how he was suddenly interested in our sales pitch when I mentioned a substantial bribe?”
Foreign Corrupt Practices Act

- The Foreign Corrupt Practices Act (FCPA), was created in 1977 as a result of over 400 U.S. companies admitting to making questionable or illegal payments to foreign government officials, politicians and political parties. Congress enacted the FCPA in an attempt to stop bribery of foreign officials and restore the integrity of American businesses.

- The FCPA’s scope was expanded in 1998. It was amended to mirror language included in the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.
  - Any “improper advantage” vs. “Business”
  - Expanded jurisdictional reach
  - Expanded definition of foreign official
What Constitutes a Violation of the FCPA?

- The FCPA is violated when:
  - An issuer or any of its officer, directors, employees, agents, or shareholders, a domestic concern, or foreign national pays, offers, promises to pay, or authorizes/approves the payment of money or anything of value:
    - To a foreign official, foreign political party, candidate for political office, or official of a public international organization
    - In a corrupt attempt to obtain, retain or direct business to any person or obtain an improper advantage
Anti-Bribery Provisions

• Prohibits the paying or offering to pay “anything of value,” whether directly or indirectly;
• To a foreign official, political party, or candidate for political office, or to any person while “knowing” that all or part of the thing of value will be paid or offered to a foreign official, political party, or candidate;
• “Corruptly” for the purpose of influencing the official in some official act or decision;
• In order to obtain or retain business or to secure any improper advantage.
FCPA Accounting Provisions

• Books and records
  – Issuers are required to make and keep detailed books, records, and accounts that fairly and accurately reflect transactions and dispositions of assets
  – Internal accounting controls

• Issuers must devise and maintain internal accounting controls to ensure that:
  – financial records and accounts are accurate for external reporting,
  – access to assets is permitted only in accordance with management instructions, and
  – the books are audited at reasonable intervals
Responsibility for Subsidiaries

• Controlled Subsidiaries
  – Greater than fifty percent share
  – Issuer is strictly responsible for subsidiary’s compliance with internal controls and books and records requirements—even when violation occurred without knowledge or participation of anyone at parent company—if financial results are consolidated

• Non-Controlled Subsidiaries
  – Fifty percent share or less
  – Issuer must proceed in good faith to use its influence to the extent reasonable to cause the subsidiary to maintain sufficient controls. Take into account the “laws and practices governing business operations” in country where the subsidiary is located.

• Government will look at actual control; not rely on record ownership – also applies to joint-venture relationships
Permissible Payments – Facilitating Payments

• What are Facilitating Payments?
• The FCPA permits small facilitating payments to a foreign official in order “to expedite or secure the performance of a routine governmental action by a government official,” e.g., non-discretionary acts
• This exception is very narrow
  – The payment may only be given to encourage an action to which the company is legally entitled (not an illegal or improper action).
  – The payment must be properly recorded to reflect the amount, purpose and recipient of the payment
Adverse Consequences of Violations

• Substantial criminal and civil penalties for companies and individuals
• Potential disclosure to the SEC (and the DOJ) in compliance with the Sarbanes-Oxley Act
• Adverse publicity/Customer impact
• Protracted, costly investigation
• Diversion of management resources
• Impediment to raising money
• Debarment from government contracts, loss of critical licenses
Trends in the Enforcement of the U.S. FCPA

• Aggressive enforcement, larger penalties and focus on individual responsibility
  – In a recent Senate Judiciary Committee hearing regarding the FCPA, Senator Arlen Spector questioned DOJ’s handling of foreign bribery cases. He stated that multimillion dollar corporate fines don’t mean a whole lot without prison sentences for corporate officials who commit the crimes.
  – Control Person Theory of Liability Expanded – See Nature’s Sunshine Products, Inc.
• Aggressive extension of jurisdiction, particularly over non-U.S. companies
• Expand responsibility of corporations beyond traditional scope of FCPA, including money laundering and fraud
• U.S. government encouraging companies to disclose possible misconduct and to cooperate with law enforcement agencies
• Greater cooperation among law enforcement agencies both in the United States and overseas
• Use of independent monitors to oversee compliance
• Foreign State Owned Entities suing US companies
• Third Party Agents – Due Diligence
Multinational Companies Targeted by U.S. Authorities

• U.S. authorities have targeted multinational companies with U.S. connections believing them to be “low hanging fruit” when it comes to corrupt practices: Statoil, Daimler, Siemens, BAE and Panalpina

• 30 years of history in prosecuting cases under the FCPA has given U.S. enforcement agencies a broad range of tools in prosecuting these cases under both the anti-bribery and accounting provisions of the FCPA
SPECIFIC AREAS OF CONCERN FOR THE CHEMICAL INDUSTRY
Areas of Concern

• Special Areas of Concern for Oil and Gas Companies
  – Mergers and acquisitions – acquiring companies may assume successor liability for FCPA violations if they fail to conduct appropriate due diligence
  • “willful blindness” – prosecution can be brought against a party that had no knowledge of corrupt payments if company aware of potential “warning signs” and consciously failed to conduct adequate due diligence
Areas of Concern

– Third party agents (especially agents in foreign countries)
  • Specifically custom brokers and freight forwarders
  • Need careful procedures to screen relationships with third parties (i.e., consultants, joint venture and teaming partners, distributors and sub-contractors)
  • Important to monitor activities of agents and employees who interact with government officials
RECENT SETTLEMENTS INVOLVING OIL AND GAS COMPANIES
November 2010: Panalpina

- 7 companies linked to the Panalpina Group, a Swiss logistics company and all in the oil industry, entered into deferred prosecution agreements with the DOJ totaling $236.5 million for FCPA violations
  - The companies also agreed to pay a total of $165,565,000 in criminal penalties. SEC settlements with the companies totaled approximately $80 million.
Panalpina Cont’d

- Panalpina entered into a three year deferred prosecution agreement with the DOJ and also agreed plead guilty to criminal charges for conspiracy to violate the books and records provision and for abetting the books and records provision
  - Together, the agreements imposed a $70,560,000 criminal penalty
  - Panalpina also agreed to disgorge $11,329,369 of illicit profit
Panalpina Cont’d

• Panalpina admitted to paying $27 million in bribes to foreign officials in several countries to expedite services for its customers, including Royal Dutch Shell and Transocean Inc.
  
  – Bribes were made to circumvent local customs processes with respect to the importation of materials and equipment
  
  – “Culture of corruption” - many Panalpina employees were involved, including those within senior management
Panalpina Cont’d

• First time SEC charged a company that is not a US issuer with FCPA violations (DOJ previously had charged non-US issuers with FCPA violations)

• SEC asserted jurisdiction over Panalpina by alleging that Panalpina acted as an agent and aided and abetted violations by its customers who are US issuers
  – Case demonstrates how the SEC can bring non-US companies under its jurisdiction
November 2010: Royal Dutch Shell

- Royal Dutch Shell and its subsidiary, Shell Nigeria Exploration and Production Company Ltd. (SNEPCO), entered into a deferred prosecution agreement and a payment of a $30 million penalty by SNEPCO.
  - In a related proceeding, Royal Dutch Shell and one of its U.S. subsidiaries, Shell International Exploration and Production, Inc., agreed to pay $14,153,536 in disgorgement and $3,995,923 in prejudgment interest to the SEC.
  - Total of $48,149,459 in criminal and civil sanctions.
Royal Dutch Shell Cont’d

• SNEPCO’s subcontractors, through Panalpina, allegedly bribed Nigerian customs officials to circumvent Nigerian clearance process and expedite the importation of certain materials and equipment on behalf of SNEPCO

• Between March 2004 and November 2006, SNEPCO allegedly reimbursed its subcontractors more than $2 million worth of Panalpina charges, knowing and intending that all or a portion of the $2 million was reimbursement for the bribes Panalpina had paid
"How long do we have to get in compliance?"
USSG: ELEMENTS OF AN EFFECTIVE COMPLIANCE PROGRAM

- Standards & Procedures
- Board Oversight (Leadership)
- Communications & Training
- Auditing & Monitoring
- Reporting Concerns
- Responding to Allegations
- Incentives & Discipline

Effective Compliance Program
ANTI-CORRUPTION COMPLIANCE PROGRAM

Board Reporting
Senior Management Oversight
(GC, CFO, COO, CECO)

Web-based & In-person
(Third Parties and T&E)
Global communications on emerging topics (UK bill)

Internal audits
Statistics
• # of client events
• Legal/Compliance pre-approval

Helplines
Compliance mailbox
Open door policy

Reward good behavior
(Compliance Champions)
Punish bad behavior
(termination, name/shame)

Anti-Corruption Policy
Entertainment P&P
Third Party P&P

Whistleblower P&P
Investigations procedure
Inside/outside counsel (under privilege)

Anti-Corruption Compliance Program
# COMPARISON CHART – UK BRIBERY ACT, OECD GUIDELINES, USSG

<table>
<thead>
<tr>
<th>UK Bribery Act (Adequate Procedures)</th>
<th>OECD (Anti-Bribery Guide)</th>
<th>USSG (Elements of Program)</th>
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<tbody>
<tr>
<td>-Codes of Conduct</td>
<td>-A clearly articulated and visible corporate policy prohibiting foreign bribery</td>
<td>-Standards &amp; Procedures</td>
</tr>
<tr>
<td>-Policies for gifts/hospitality, due diligence of 3Ps</td>
<td>-guidance of gifts/ent., donations, diligence of 3Ps</td>
<td>§8B2.1(b)(1)</td>
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<tr>
<td>-Support for AC Program @ highest levels</td>
<td>-Oversight of program is duty of senior corporate officers</td>
<td>-Board Oversight</td>
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<td>-Dedicated compliance function in large companies</td>
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<td>§8B2.1(b)(2)(A)(B)(C)</td>
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<tr>
<td>Employment Procedures – vetting of new staff</td>
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<td>Proper due diligence on new employees</td>
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<td></td>
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<td>§8B2.1(b)(3)</td>
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<tr>
<td>Training for all relevant staff</td>
<td>Periodic communications &amp; documented training for all levels of company</td>
<td>Training and communications</td>
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<td></td>
<td></td>
<td>§8B2.1(b)(4)(A)(B)</td>
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<tr>
<td>Regular auditing of AC program</td>
<td>Periodic review of program</td>
<td>Auditing and monitoring</td>
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<td></td>
<td></td>
<td>§8B2.1(b)(5)(A)(B)</td>
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<tr>
<td>Whistleblower hotline</td>
<td>Internal &amp; confidential reporting of breaches of law</td>
<td>Reporting concerns &amp; Responding to allegations</td>
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<td></td>
<td></td>
<td>§8B2.1(b)(5)(C), (b)(7)</td>
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<td></td>
<td>Encourage support for compliance, &amp; appropriate discipline procedures</td>
<td>Incentives &amp; Discipline</td>
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<td></td>
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<td>§8B2.1(b)(6)</td>
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<tr>
<td>Tailored corruption risk mgmt procedures for higher risk jurisdictions &amp; transactions</td>
<td>Periodic reviews of program taking into account relevant developments &amp; evolving int’l / industry standards</td>
<td>Periodic risk assessments</td>
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<td>§8B2.1(c)</td>
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How to Approach Third Party Due Diligence

• A risk assessment that measures the likelihood and severity of possible violations, and directs compliance resources based on that assessment

• A systematic and consistent due diligence effort to vet third parties tiered at levels of inquiry based on a thorough business inventory and risk assessment

• Consistent warranties and representations that support the company’s ethics program and require compliance of all business partnerships abroad, including any agent acting for the company on any level

• Automated renewal to maintain and reinforce commitment to compliance among all third-party intermediaries
Some Important Questions to Ask

• Has the subject cooperated in completing a due diligence questionnaire and other relevant disclosures/declarations?
• Who are the subject’s social and business associates?
• Have any recommendations to use this third party originated among government officials?
• What is the service being requested? Is compensation commensurate with market rates or disproportionate to the job being done? If there’s a payment involved, where is it going? Offshore account?
• Is the payment to be made in the name of the corporation or some other individual or relative of the individual?
• Is the payment to be in cash or cash equivalent
• Have any unusual payment patterns or financial arrangements emerged?
• What is known about their past social relationships and to what extent are they connected with government officials?
A company should consider...

- Issuing clear company policies on what constitutes unacceptable behavior and enforcing the prescribed consequences
- Thoroughly and regularly training employees to address the enforcement of international anticorruption standards
- Routinely conducting due diligence on third parties, such as agents, sales consultants, distributors, vendors, brokers and freight forwarders
- Performing due diligence on business partners, personnel, and contracts
- Performing frequent field tests to determine whether employees understand company policies and testing the adequacy of existing programs and controls
- Streamlining payment systems to easily see where, why and how much money is being spent and where it is going
Other important questions...

• Who “owns” the FCPA compliance programs and to whom does that person report to?
• Do we have special policies and procedures dedicate to FCPA/anti-corruption?
• Are we doing FCPA compliance assessments? How often? In which countries?
• Do internal audits include FCPA specific audits? If not, why not?
• Are we training the appropriate people? Is it web-based or in-person?
• How are we handling whistleblower complaints? Has that change since the Dodd-Frank Act?
U.K. BRIBERY ACT
U.K. Bribery Act: Main Offense

- Directly or indirectly, offering, promising or giving a financial or other advantage, to another person, intending the advantage to induce or reward someone for performing a function improperly
  - Relevant functions
  - Activities connected with a business
  - Activities performed during course of employment
  - Activities performed on behalf of corporations
  - Functions of a public nature
U.K. Bribery Act: Bribery of Foreign Public Officials

- Directly or indirectly, offering, promising or giving a financial or other advantage, to an FPO in his/her capacity as an FPO, intending to obtain or retain business or a business advantage
- Unless FPO is explicitly permitted or required to be paid
- FPO covers individuals who:
  - Hold legislative, administrative or judicial positions; or
  - Exercise a public function for a foreign country or territory or for a foreign public agency or public enterprise
Consequences and Individual Liability

• Hospitality and foreign public officials – no specific word, left to prosecutorial discretion

• Although considered, facilitation payments not permitted

• “Senior officers” liable if they consent or connive
  − “Senior officer” includes partners, directors, managers, company secretaries and other similar officers
U.K. Law:
Responsibility for Third Parties

• Failure of commercial organizations to prevent bribery:
  – Offense can be committed by a “relevant commercial organization” where a person associated with the RCO bribes another person intending:
    • To obtain or retain business for the RCO; or
    • To obtain or retain a business advantage in the conduct of business for RCO
  – Associated person is someone who performs services for or on behalf of RCO
  – RCO includes UK corporations and partnerships AND any other corporation or partnership carrying on business in the UK

• Defense for RCO to prove that it had adequate procedures designed to prevent associated persons from engaging in bribery
# FCPA AND U.K. BRIBERY ACT COMPARISON

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<th>Is it an offense?</th>
<th>FCPA</th>
<th>U.K. Bribery Act</th>
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<tbody>
<tr>
<td>Bribery of Foreign Officials</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Private Sector Bribery</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Facilitation Payments</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Failure to keep accurate records/internal controls</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Liability for acts of third parties</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Compliance Program</td>
<td>Yes, for mitigation under USSG</td>
<td>Yes, for adequate procedures defense</td>
</tr>
</tbody>
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FCPA IMPLICATIONS FROM THE DODD-FRANK ACT
Background on Dodd-Frank

• Amendment protects and rewards whistleblowers that voluntarily provide “original information” to the SEC relating to the violation of a securities law (including the FCPA), which results in a fine/penalty for the violator of more than $1 million

– “Original information” means information derived from independent knowledge or analysis, not otherwise known to the SEC
• Minimal work for whistleblower
  – Unlike whistleblowers under other statutes, like the False Claim Act, a whistleblower under the Dodd – Frank Act is not required to file a complaint
  – Whistleblower only required to bring violation to the attention of the government
Dodd-Frank Impact on FCPA

- Based on increasing fines imposed for FCPA violations, whistleblowers have an incentive to report alleged actions of foreign corruption to the SEC
  - Qualified whistleblowers receive up to 30 percent of the monetary penalty collected (at the discretion of the SEC)
  - Increased penalties for FCPA violations over the last few years increases incentives for whistleblowers
Dodd-Frank Impact Cont’d

• Act requires issuers in the oil, gas, and mineral extraction industries to include in their corporate annual reports info concerning royalty, licenses and other payments made to the US and foreign governments in connection with the issuers’ resource extraction activities

  – Affected issuers required to report type and amount of such payments on a project-by-project basis. No confidentiality protection and info will be made available to the public
Dodd-Frank Impact Cont’d

• Amendment adds new element to the compliance challenge
  – companies now have to consider possibility of whistleblower claims from financially self-interested employees
  – Changes analysis concerning “self disclosing” potential FCPA violations
  – timing becomes more complicated and riskier because unknown whether whistleblower in contact with the government
Alien Tort Statute and Foreign Corrupt Practices Act: Potential Liability from Operations Abroad: Views from In-House Counsel – Self Audit Programs and Preventative Measures

Presented by: Joseph F. Speelmaan