Quarterly FCPA Report

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I. Introduction

2010 is already shaping up to be another significant year for enforcement of the U.S. Foreign Corrupt Practices Act ("FCPA"). The U.S. Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC") appear to be pursuing a course of aggressive investigation and prosecution both within the United States and through cooperation with foreign authorities. Companies that voluntarily disclose their FCPA violations continue to reap significant benefits when dealing with U.S. authorities. As the increased enforcement stance of U.S. law enforcement continues, effective FCPA compliance programs should be a priority for any entity doing business outside of the United States.

On the corporate enforcement side, the DOJ obtained a major victory in the first quarter of 2010 when it announced that defense contracting giant BAE Systems plc ("BAE") would plead guilty and pay a fine of $400 million in the U.S. A number of publicly traded corporations have also recently disclosed that they are in talks to settle FCPA investigations with the DOJ and the SEC. The amounts reportedly set aside for settlements range from $300,000 (Veraz Networks) to $344 million (Technip).

The DOJ's 2010 enforcement efforts have been no less vigorous when pursuing individuals. The first quarter opened with the dramatic arrests of 21 individuals in Las Vegas and one other individual in Miami as part of a mass FCPA sting operation. Simultaneously, the FBI executed search warrants throughout the United States requiring the assistance of 150 FBI agents. The DOJ has since initiated several new prosecutions and closed some of its open FCPA cases.

If the first quarter is any indication, 2010 may mark a new era in FCPA enforcement. As Assistant Attorney General Lanny Breuer stated at a recent ABA White Collar Crime Conference, the DOJ is "ready, willing, and able to try FCPA cases in any district in the country" and will continue "the aggressive prosecution of individuals" and "insisting on stiff corporate fines" where there is an "egregious, pervasive, and systemic culture of corruption" or where a corporation "fails to implement compliance reforms, changes to its corporate culture, and undertake other measures designed to prevent a recurrence of the criminal conduct."

As the recent FCPA enforcement actions demonstrate, FCPA enforcement is a priority for Breuer and the DOJ. In response, companies operating overseas must become more vigilant in adopting and implementing anti-corruption and anti-bribery programs, training their employees, agents, and consultants, and creating a culture of integrity and compliance. The following cases from the first
quarter of 2010 demonstrate the consequences of being unprepared in this new era of FCPA enforcement.

II. Summary of Recent Corporate Enforcement Actions

A. NATCO Group, Inc.

On January 11, 2010, the SEC settled its first FCPA case of the year with an oil field services provider, NATCO Group, Inc. According to the SEC, NATCO’s subsidiary, TEST Automation & Controls, Inc. (“TEST”), created and accepted false documentation while paying extorted immigration fines and acquiring immigration visas in Kazakhstan. The SEC charged NATCO with violating the FCPA’s books and records and internal controls provisions, despite acknowledging the extortive nature of the fines, stating that NATCO’s internal accounting system had failed to ensure that TEST truthfully recorded the true nature of the payments, and that NATCO’s consolidated books and records contained numerous inaccuracies as a result.

As part of the SEC settlement, NATCO consented to an order requiring NATCO to cease and desist from committing or causing any further violations, without admitting or denying any allegations. NATCO also agreed to pay a $65,000 civil penalty. Notably, this case demonstrates that, even when a company does not have a corrupt intent in making the payments, the company can still face civil charges based on the books and records and internal controls provisions of the FCPA if they mischaracterize the payments.

B. BAE Systems plc

In 2004, allegations surfaced in the U.K. press that BAE Systems, the world’s second largest defense contractor and a supplier to the Pentagon, had secretly paid $2 billion in improper payments to Prince Bandar bin Sultan, Saudi Arabia’s former Ambassador to Washington. The money was purportedly paid to secure the al-Yamamah contract, an $80 billion deal signed in the 1980s to sell Typhoon jet fighters to the Saudi government. The press reported a multitude of corrupt practices and behavior on the part of BAE and some of its employees. In 2004 the U.K Serious Fraud Office (“SFO”) opened an investigation into the al-Yamamah deal. However, BAE was never charged in the U.K. in connection with this particular investigation.

The SFO abruptly dropped the investigation in December 2006, when Saudi Arabia threatened to end anti-terrorism cooperation with the U.K. unless the SFO halted its inquiry. The SFO cited the “need to safeguard national and international security.” In 2007, the investigation into BAE’s alleged corrupt activities was taken up by the DOJ.

In 2008, however, the SFO opened a different investigation, looking into BAE’s contracts for Saab Gripen fighter jets supplied to the Czech, Hungarian, and Austrian governments. The SFO also looked into suspicious circumstances surrounding the Romanian government’s purchase of Navy frigates refurbished by BAE, BAE’s contract for the supply of jet fighters and other military vehicles to the government of South Africa, and BAE’s sale of an air traffic control system in Tanzania.

It was not until February 5, 2010, that BAE pleaded guilty and reached a settlement with both the DOJ and the SFO. In the U.K., BAE Systems agreed to pay GBP 30 million in penalties along with pleading guilty to one charge of breach of duty to keep accurate accounting records in connection with improper payments made in the course of negotiating BAE’s Tanzanian deal.
However, two social justice organizations filed for an injunction against the SFO with the High Court in the U.K. to prevent the SFO from settling with BAE. The two U.K. organizations, Corner House and Campaign Against Arms Trade, asked the Court for the injunction so that they could seek a judicial review of the SFO’s plea agreement with BAE. Many campaigners in the U.K. and elsewhere felt that the authorities in the U.K., particularly the SFO, were too lenient on the company. On March 24, 2010, the High Court refused to order the judicial review, but the groups have stated they may appeal the decision.

In the U.S., BAE agreed to a $400 million settlement with the DOJ and pleaded guilty to a one-count criminal information charging BAE with conspiracy to impede and impair the work of the U.S. government and making false statements in relation to BAE’s operations, thereby defrauding the U.S. government. The information focused largely on improper activity with relation to the Al-Yamamah deal, detailing an elaborate scheme of bribery and money laundering through offshore shell companies. BAE had also certified to the DOJ that it was not violating the FCPA and had made commitments to the DOJ and U.S. Department of Defense in 2000 with regard to its anti-corruption compliance programs, but had failed to honor these promises, as evidenced by the complicated scheme and network to commit bribery as well as to conceal it.

In addition, BAE may be debarred by the U.S. Department of State, which would limit BAE’s ability to export products with U.S.-made content. The State Department is legally obliged to review the settlement, and has announced that it is currently reviewing the plea agreement to determine what steps it will take under the Arms Export Control Act and the International Traffic in Arms Regulations with regard to BAE license applications. Until the review is completed, a temporary hold has been placed on all licenses and other approvals where BAE or its subsidiaries are involved.

C. Nexus Technologies, Inc.

On March 16, 2010, Nexus Technologies, Inc., along with its president and two employees, pleaded guilty to a scheme whereby Nexus paid “commissions” to Vietnamese officials as a condition of being awarded contracts from various Vietnamese government departments. From 1999 until 2008, Nexus paid more than $250,000 in bribes to government officials in Vietnam. The DOJ charged the defendants with one count of conspiracy to violate the FCPA, the Travel Act, and money laundering, nine counts of violating the FCPA, nine counts of money laundering, and nine counts of violating the Travel Act.

Nexus pleaded guilty to all counts, agreed to dissolve, and will face a maximum fine of $27 million at sentencing in July. In its plea, Nexus admitted that it operated primarily through criminal means.

D. Innospec Inc.

On March 18, 2010, Innospec Inc., pleaded guilty to defrauding the United Nations (“UN”), to violating the FCPA, and to violating the U.S. embargo against Cuba. Innospec pleaded guilty to wire fraud in connection with Innospec’s payment of kickbacks to the former government of Iraq under the UN Oil for Food Program (“OFFP”), as well as violations of the FCPA in relation to bribes it had made to officials of the Iraqi Ministry of Oil to ensure that an alternative product to Innospec’s product failed field tests so that Innospec’s products would be purchased instead of competitors’ products. Travel expenses and pocket money for non-business related trips for Iraqi officials were also falsely characterized and inaccurately recorded as “sales promotion expenditures.” In a related action,
Innospec settled with the U.S. Office of Foreign Assets Control ("OFAC") for its sale of chemicals to Cuban power plants in violation of the U.S. embargo against Cuba.

Innospec agreed to pay a total of $14.1 million in criminal fines for all of its violations and to retain an independent compliance monitor for a minimum of three years to oversee Innospec’s implementation of an anti-corruption compliance program and to report to the DOJ. Innospec agreed to give its full cooperation to the DOJ and other U.S. as well as foreign authorities in ongoing investigations.

Innospec settled a related civil complaint with the SEC, which charged Innospec with violations of the FCPA’s anti-bribery, internal controls, and books and records provisions. Innospec agreed to disgorge $11.2 million in profits to the SEC. Innospec has also agreed to pay a $2.2 million administrative fine to resolve the outstanding issues with OFAC related to its violations of the U.S. embargo against Cuba.

Abroad, Innospec pleaded guilty in London in a case brought by the SFO. The case was connected to illegal payments made by Innospec to Indonesian officials. Innospec will pay a criminal penalty of $12.7 million as a result. Notably, the SFO case developed through a referral from the DOJ. The DOJ Press Release acknowledged the “extensive coordination and cooperation” with the SFO in bringing this enforcement action against Innospec.

E. Daimler AG

On April 1, 2010, Daimler AG, a German corporation, and three of its subsidiaries settled FCPA charges with the DOJ. According to the statement released by the DOJ, Daimler AG and its subsidiaries agreed to pay a total of $93.6 million in criminal fines and penalties. Daimler’s Russian subsidiary DaimlerChrysler Automotive Russia SAO ("DCAR"), now known as Mercedes-Benz Russia SAO, and Daimler’s German subsidiary, Export and Trade Finance GmbH ("ETF") each pleaded guilty to criminal informations charging conspiracy and violation of the FCPA’s anti-bribery provisions. Daimler AG itself entered into a deferred prosecution agreement and agreed to the filing of a criminal information charging the company with one count of conspiracy to violate the books and records provisions of the FCPA and one count of violating those provisions. Daimler’s subsidiary in China, DaimlerChrysler China Ltd ("DCCL"), now known as Daimler North East Asia Ltd., also entered into a deferred prosecution agreement and agreed to the filing of a criminal information against it charging conspiracy and violation of the FCPA’s anti-bribery provisions. DCAR admitted to making improper payments to Russian federal and municipal government officials in order to obtain contracts to sell motor vehicles. DCAR over-invoiced customers and paid the excess to government officials or to designated third parties, and both DCAR and Daimler AG employees caused the wire transfer of payments from Daimler AG’s bank accounts in Germany to U.S. bank accounts (among other locations) held by shell companies, with the understanding that the money was for Russian government officials.

ETF admitted that it made improper payments to Croatian government officials and third parties, including U.S.-based corporate entities, with the understanding that the funds were ultimately for Croatian government officials. DCCL also admitted to making bribes in the form of commissions, delegation travel, and gifts to Chinese government officials, and occasionally using U.S.-based agents to facilitate the payments.

The deferred prosecution agreements for Daimler AG and DCCL are dependent on a requirement that no more FCPA violations occur during the two-year term of the agreements, and that the companies maintain a comprehensive compliance program. Most notable in the deferred prosecution agreement,
however, is that the DOJ specifically reduced the minimum fine allowable by the U.S. Sentencing Guidelines by 20% in recognition of Daimler’s cooperation with the investigation. Thus, by cooperating with the DOJ, Daimler reduced its penalty by more than $22 million.

The SEC also announced a settlement with Daimler on April 1, 2010. The SEC complaint alleged that Daimler had a repeated, systematic practice of bribing foreign government officials to obtain business in Africa, Asia, the Middle East, and Eastern Europe. Daimler agreed to pay $91.4 million in disgorgement to settle the SEC’s charges.

III. Summary of Recent Individual Enforcement Actions

A. FCPA Sting Operation

On January 19, 2010, the FBI arrested 21 individuals at a Las Vegas law enforcement and military equipment supplier’s convention. The FBI also arrested another person in Miami and executed search warrants throughout the United States. Simultaneously, the City of London police served search warrants of their own in connection with this investigation. The DOJ charged each defendant with conspiracy to violate the FCPA, aiding and abetting a violation of the FCPA, and conspiracy to commit money laundering.

The defendants were charged separately and in pairs, but each indictment rests on similar facts. The indictments allege that each defendant met with a sales broker and a person posing as someone with a direct connection to an African Minister of Defense. That person, referred to in the indictments as UA-1, and the defendants allegedly came to an agreement whereby the defendants would sell some military or law enforcement item to the African state and overcharge the state by 20%. After receiving payment, the defendants were supposed to transmit that 20% back to UA-1. Each defendant allegedly knew and agreed to the fact that half of the 20% would be given to the African Minister of Defense and half would go to the broker and UA-1 and that sending this money was an essential part of the deal.

Each defendant allegedly engaged in a test sale for a small amount of their product, intended to assure the Minister of Defense that he would receive his 10% payment. The indictments state that each defendant prepared an invoice for a small amount of their goods and then prepared another invoice with the 20% markup and transmitted them to UA-1. The defendants are then alleged to have sent their product to a location in Virginia and to have received payment. The indictments state that each defendant transmitted the necessary 20% to UA-1.

After having purportedly assured the Minister of Defense that he would receive his 10%, the defendants allegedly met with the sales broker and another individual, UA-2, who also worked for the Minister of Defense. At that meeting, the defendants are supposed to have accepted purchase orders for the larger sale, valued at $15 million.

In the end, the defendants learned that there was no African Minister of Defense. UA-1 and UA-2 were Undercover Agents 1 and 2, and the entire deal was part of the largest FCPA sting operation in the history of the Act. Instead of receiving a $15 million purchase order, the defendants were charged with conspiracy to violate the FCPA, aiding and abetting a violation of the FCPA, and conspiracy to commit money laundering, and they face more than 25 years imprisonment if convicted.

Some defendants have begun negotiating plea bargains with the DOJ. Recently Daniel Alvirez, one of the 22 defendants, is reported to have been in talks to plead guilty to two counts of conspiracy to
violate the FCPA. Under those charges, Alvirez would face a maximum sentence of 10 years imprisonment.

While the indictment of these 22 individuals is remarkable, it may only be the beginning of the government’s enforcement efforts as the DOJ begins to investigate them, their associates, and their companies. In some cases, these investigations could produce substantial fines and penalties and lead to investigations of implicated companies. Moreover, as defendants plead guilty, new FCPA violations may come to light as in the case of Alvirez. While Alvirez was originally charged with the same offenses as all of the other defendants, the new information filed against him also alleges FCPA violations in the Republic of Georgia.

B. Juthamas and Jittisopa Siriwan

At the end of 2009, the DOJ successfully prosecuted Patricia and Gerald Green for violating the FCPA when they bribed a Thai tourism official in order to obtain business for their film industry companies. Juthamas Siriwan is the official whom the Greens bribed, and Jittisopa Siriwan is her daughter. According to the indictment, unsealed on January 19, 2010, Juthamas Siriwan received a number of payments from the Greens, and those payments were often funneled through bank accounts opened by and in the name of Jittisopa Siriwan.

Notably, this prosecution is one of the few times that the official who was bribed has been indicted by the DOJ. In contrast to the laws of other countries, there is no provision in the FCPA allowing the U.S. government to punish the official who has been bribed. However, the U.S. money laundering statute may provide an alternative for prosecutors seeking to deter the solicitation and acceptance of bribes by government officials. The indictment in this case charged Juthamas and Jittisopa Siriwan with conspiracy to commit money laundering and aiding and abetting money laundering where the underlying crime was a violation of the FCPA.

C. Richard T. Bistrong

According to the New York Times, Richard Bistrong was the sales broker in the January FCPA sting. However, an information filed against him later alleged that he conspired to violate the FCPA in his own right. On January 21, 2010, the DOJ filed an information alleging that Bistrong had paid bribes to officials in Nigeria, in the Netherlands, and at the United Nations in order to obtain business for his company. Bistrong was charged with conspiracy to violate the FCPA’s anti-bribery and books and records provisions, as well as conspiracy to violate the International Emergency Economic Powers Act.

According to the information, Bistrong would typically authorize bribes to a procurement officer at the relevant entity either to obtain information about the bidding process or to influence the bid product specifications. For example, in the Netherlands, the bribes he authorized were used to have a Dutch procurement officer draw up bid specifications that could only be fulfilled by Bistrong’s company.

D. Jim Bob Brown and Jason Edward Steph

On January 28, 2010, Jim Bob Brown and Jason Edward Steph, were sentenced for their roles in making improper payments to foreign officials while working for Wilbros International. They had each previously pleaded guilty to one count of conspiracy to violate the FCPA. In his 2007 guilty plea, Steph admitted to making improper payments to Nigerian oil officials to secure oil pipeline work in Nigeria. Brown, in his 2006 guilty plea, admitted to similar acts as well as bribing Nigerian revenue and court officials to obtain preferential treatment and making payments to Ecuadorian officials in order to
obtain oil pipeline contracts. Brown was sentenced to a year and a day in prison as well as a fine of $17,500. Steph received a sentence of 15 months and a fine of $2,000.

E. Jean Fourcand and Robert Antoine

On February 1, 2010, the DOJ filed a criminal information against Jean Fourcand for engaging in monetary transactions in property derived from specified unlawful activity. In this case, Fourcand had helped a Florida-based telecommunications company bribe officials at the state-run Haiti Teleco. Fourcand would receive funds either directly or from an intermediary and then pass those funds onto Haitian government officials. Robert Antoine, who pleaded guilty to conspiracy to commit money laundering on March 12, 2010, was one of the Haitian officials who received payments from Fourcand. The alleged purpose of these payments was to help the Florida company obtain and retain Haiti Teleco’s business. Fourcand pleaded guilty and faces up to 10 years in prison. Antoine faces a maximum sentence of 20 years in prison. Again emphasizing the DOJ’s international cooperation, the official press release announcing Antoine’s plea commended Haitian law enforcement officials for their “commitment and professionalism.”

F. John W. Warwick

John W. Warwick pleaded guilty on February 10, 2010, to one count of conspiracy to violate the FCPA. Warwick and Charles Jumet paid Panamanian officials in order to receive lighthouse and buoy maintenance contracts for Ports Engineering Consultants Company ("PECC"). Warwick admitted to making payments to three separate Panamanian officials amounting to more than $200,000 total. According to the indictment, the payments were made after PECC received the maintenance contract. Warwick agreed to forfeit the proceeds of his actions and may be sentenced to up to five years in prison.

G. Nam Nguyen, An Nguyen, and Kim Nguyen

On March 16, 2010, in connection with the Nexus Technologies case discussed above, Nam Nguyen and An Nguyen pleaded guilty to a conspiracy charge and then a single count each of violating the FCPA, the Travel Act, and committing money laundering. They each face up to 35 years in prison. Kim Nguyen pleaded guilty to the conspiracy count, one substantive FCPA count, and one count of money laundering and faces up to 30 years at sentencing. Notably, the DOJ specifically thanked the Independent Commission Against Corruption of the Hong Kong Special Administrative Region for its assistance in the investigation.

IV. Conclusion

The increasing aggressiveness of the DOJ and SEC in investigating and prosecuting violations of the FCPA has demonstrated a number of important trends. Voluntary disclosure continues to provide benefits for corporations even though FCPA fines overall are increasingly high. Cooperative resolutions with foreign authorities are continuing at a brisk pace. Increased foreign cooperation and penalties make FCPA compliance programs necessary to conduct business abroad successfully.

On the corporate enforcement side, voluntary disclosure has produced tangible benefits for companies like Daimler, which received a 20% reduction in its fine from the DOJ based on its cooperation and remedial actions. Yet, in other cases, the DOJ continues to pursue significant fines, such as the $400 million fine in the BAE case. Beyond significant fines, FCPA violations can have far-reaching consequences, such as potential disbarment by the U.S. Department of State. Thus, while catching
offenses and disclosing offenses is important, a compliance program to prevent offenses is the best defense.

For individual enforcement efforts, the DOJ has committed itself to a strategy of “aggressive enforcement.” No longer will the DOJ wait for a company to self-report its employees’ wrongdoing. The DOJ and the FBI devoted significant resources to the FCPA sting operation, and while it is unclear how pervasive such efforts will be in the future, there is nothing to stop the FBI from pursuing additional undercover FCPA operations. Moreover, the DOJ has pursued new charging strategies with the Siriwans and new investigatory tactics with the use of Bistrong as an industry insider to root out other corrupt individuals. As the DOJ and FBI become more flexible and proactive in enforcing the FCPA, it becomes even more important that individuals in positions of authority receive proper training on how to avoid becoming entangled in activities that violate the FCPA.

Finally, of especially important note is the significant increase in foreign cooperation in both corporate and individual enforcement efforts. The cases against BAE, Innospec, Nexus, and Robert Antoine all demonstrate that U.S. authorities are working in conjunction with foreign anti-bribery officials to coordinate their enforcement efforts.

The first quarter of 2010 has revealed an aggressive pursuit of both individuals and companies by the DOJ and SEC. The FCPA will continue to be a top priority of the U.S. enforcement agencies. It is now more vital than ever that companies evaluate their existing compliance programs for their ability to mitigate risk and avoid noncompliance or implement an anti-corruption compliance program to ensure their company’s adherence to the FCPA.

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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