Bloomberg Law Reports®

September 12, 2011

Corporate Counsel

Anti-Corruption

Increasing Coordination and More Widespread Prosecution under Anti-Bribery Laws

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In 1977 the U.S. Congress passed the Foreign Corrupt Practices Act (FCPA) to combat the bribery that was endemic in American businesses' dealings abroad and had been revealed incidentally by the Watergate investigation. Since that time, a substantial transnational legal regime has arisen to prosecute companies and their employees for bribing officials of foreign governments and, more recently, for bribing private commercial parties.

Companies are now paying attention to the rapidly accelerating enforcement of the FCPA by the U.S. and to the passage and enforcement of similar laws abroad because of the high fines and targeted investigations even against individuals within companies. For example, Siemens is paying about $2 billion in fines, disgorgement, and investigation costs as the result of a joint American-German investigation.[1] Companies can look forward to future foreign bribery investigations involving cooperating authorities and investigative or adjudicative proceedings in more than one country and enforcement actions that target a broader spectrum of conduct than in the past.

International Law on Foreign Bribery and Local Implementing Legislation

Thirty-eight countries are parties to the Organization for Economic Cooperation and Development (OECD) Convention on Preventing Bribery of Foreign Public Officials in International Business Transactions, and 154 countries are parties to the United Nations Convention against Corruption. Both treaties require states parties to criminalize (and to enforce their laws against) bribery of foreign public officials, as well as to assist other states parties in investigating foreign bribery; however, the OECD's requirements are more concrete than those of the broader-based UN treaty.[2]

In the past year, China and Russia have both passed laws to implement the UN Convention – their own versions of the FCPA. While it remains unclear to what extent those laws will be enforced, the U.S. government and international organizations are pressuring the two developing behemoths to prosecute foreign bribery and to do so cooperatively.

Russia Agreeing to Play by the Rules

In May of 2011, after passing its foreign bribery law to comply with one of its UN Convention obligations, Russia signed the OECD Convention and was welcomed into the OECD's anticorruption working group. The move was part of Russia's ongoing attempt to join the OECD. Many are skeptical of Russia's intentions because bribery of government officials is commonplace in Russia itself. However, even if Russian authorities do not initiate foreign bribery prosecutions of their own, Russian compliance with the mutual legal assistance and other coordination provisions of the OECD Convention could make other countries' foreign bribery prosecutions more numerous and more effective.[3]

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An FCPA for China

Earlier in 2011, China amended its existing prohibition on bribery of its own government officials and commercial bribery to include officials of foreign governments and public international organizations. This addition to China's criminal code will enable FCPA-like prosecution of Chinese individuals, people present in China, and Chinese entities, including those that are wholly foreign-owned. Penalties would include jail time for individuals and fines for both companies and their employees who were responsible for the bribery.

If China actually enforces its foreign bribery law, it will go a long way toward accomplishing the goal of multilateral anti-bribery regimes because Chinese companies are likely the weakest link among those that compete for government contracts in the parts of the world with endemic corruption. Their principal competitors are generally subject to American, British, German, or other actively enforced prohibitions.

While the Chinese government has not yet released enforcement guidelines, which are profoundly important in Chinese law, the new foreign bribery law was the principal subject of a meeting of the China-U.S. Anticorruption Working Group that began on July 26, 2011, in Beijing.[4] American officials maintained that the summit would be an exercise in information gathering for them, but David M. Luna of the State Department, the American co-chair of the working group, offered China "help to stand up enforcement and compliance programs" and in preparing for review by the UN treaty body that administers the Convention against Corruption.[5]

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Beginning of Australian Foreign Bribery Law Enforcement

The Australian government began its enforcement of its own foreign bribery law on July 1, 2011, charging Note Printing Australia and Securency, a company of which the Reserve Bank of Australia owns 50 percent and a wholly owned subsidiary of Australia's central bank. Australian authorities have also arrested and charged seven individuals from the companies. The two firms, which peddle Australia's sophisticated banknote materials and printing technology, are accused of having bribed officials in Malaysia, Vietnam, and Indonesia for currency printing contracts. The outcomes of these prosecutions will provide some insight into the future of Australian anti-corruption enforcement; potential penalties, especially for the individual defendants are stiff, but the Australian law requires proof beyond a reasonable doubt.[6]

It is telling that the Australian Federal Police have 20 investigators working full-time on the banknote case. This development of specialization in foreign bribery may lead to a dedicated enforcement team of the sort that the FBI, Department of Justice, and SEC in the U.S. and Serious Fraud Office (SFO) in the UK have.

Malaysia and Vietnam have undertaken corresponding investigations of the alleged bribe recipients, consistent with their obligations under the UN Convention, which directs states parties to investigate and prosecute bribe recipients in their own countries, as well as those who bribe foreign officials. The UK's SFO, which enforces the UK Bribery Act of 2010, Britain's anti-corruption treaty implementing legislation, has assisted with the Australian investigation, even arresting alleged bribe-paying agents in the UK and engaging in coordinated raids of the offices of alleged wrongdoers.

Japanese Prosecution Attempt

While Japan is one of the least active prosecutors of corruption in the OECD, Japanese prosecutors have undertaken one foreign bribery investigation of executives of Pacific Consultants International, a large Japanese consulting firm that operates in Southeast Asia, in 2011. Prosecutors suspected the executives of bribing Vietnamese government officials in order to win contracts.[7]

While Japanese prosecutors ended up abandoning the charges under the foreign bribery law because of a lack of access to bribe recipients, the investigation revealed tax evasion and "breach of trust," which prosecutors are pursuing. If this flexible prosecution strategy, akin to those used in the U.S., is an indicator of what is to come, Japanese companies will have strong incentives to conform to international anti-bribery norms.

Bribery of U.S. Government Officials Prosecuted in Korea

South Korea also passed a law similar in substance to the FCPA that took effect in 1999 to implement the OECD's anti-bribery convention. The Korean law establishes due effort to comply with the law as a defense available to corporate defendants. It provides for individual sentences of up to five years' imprisonment or fines of up to twice the profit from corrupt acts. Corporate fines can also be as high as the twice the profit resulting from the bribes.[8]

As of the middle of 2010, South Korea had used its foreign bribery law to prosecute at least 13 individuals. South Korea is also one of the world's most active prosecutors of companies that bribe its own government officials.

From 2001 to 2006, Gi-Hwan Jeong, the CEO of Samsung Rental Company, bribed two officials of the U.S. Government stationed

in Korea to obtain and retain contracts to provide Internet service to American military forces on the peninsula. The bribes worth almost $200,000 took the forms of cash, services of prostitutes, travel, and stock options. After one of Jeong's former employees reported the bribery to U.S. Air Force investigators, the American and Korean governments investigated. A Korean court convicted Jeong under the foreign bribery law, fined him about $10,500, and sentenced him to time served, which was 58 days.

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After submitting a request under the mutual legal assistance treaty between South Korea and the U.S. for evidence from Jeong's prosecution, ostensibly to be used against the American bribe recipients, the U.S. induced Jeong to travel to Texas to discuss money that he claimed the U.S. government still owed his company. American authorities arrested Jeong and charged him with bribing government officials and related offenses. He entered a conditional guilty plea, and the court sentenced him to five years' imprisonment and a $50,000 fine. The Fifth Circuit upheld the conviction in October of 2010, noting, essentially, that there is no prohibition on international double jeopardy.[9]

A Multinational Investigation with the U.S. in the Lead

The highly publicized investigation of engineering companies KBR (American), JGC (Japanese), Technip (French), and Snamprogetti (then Dutch) that ended in all four companies entering into deferred prosecution agreements with the Department of Justice or pleading guilty, in additiona to settling with the SEC, is a good example of international coordination and potential for confusion in foreign bribery law enforcement.[10] The four companies controlled a joint venture called TSKJ that bribed various Nigerian government officials using bank accounts controlled by a British lawyer and a Japanese trading company in order to secure approximately $6 billion in contracts to build a liquefied natural gas facility. Bidding on and bribing for that contract began in the early 1990s.

While it was American authorities to whom the consortium members collectively paid more than $1.3 billion in fines, disgorgement, and other penalties between 2009 and 2011, TSKJ's conduct was discovered by French prosecutors years earlier. In an investigation of a separate oil and gas foreign bribery scheme, a former executive of Technip, Georges Krammer, defended his conduct on behalf of another company, Elf-Aquataine, telling an investigating judge what he knew about Technip's bribery practices in several parts of the world, including Nigeria.

The French investigation sparked not only the American investigation of all four companies for FCPA violations, but also the prosecutions in Texas and plea agreements of former KBR CEO Albert "Jack" Stanley and the British lawyer who actually made many of TSKJ's corrupt payments, Jeffrey Tesler. Tesler was extradited to the U.S. by the UK for the trial, and the U.S. court ordered him to pay more than $150 million in disgorgement of profits.[11] Stanley, also prosecuted in U.S. District Court in Houston, was sentenced to 84 months in prison and ordered to pay $10.8 million in restitution; however, the government agreed to recommend reductions in Stanley's sentence in exchange for cooperation.[12]

Additionally, an investigation by the UK's SFO was resolved when a British KBR subsidiary, M.W. Kellogg, agreed to pay a fine of £7 million, approximately the amount it received in dividends from the illegal TSKJ scheme. The SFO did not impose further penalties because the British company voluntarily disclosed its conduct and was not itself responsible for the wrongdoing. In the future, UK authorities are likely to be more active in coordinated, international investigations because the TSKJ scheme predated the UK Bribery Act of 2010, under which the UK claims jurisdiction to prosecute anyone "carrying on a business" in the UK, including most parent companies with UK subsidiaries.

The potential for confusion entered in the TSKJ case when Nigeria arrested employees of TSKJ consortium members who, their employers claimed, were below the managerial level. Nigerian prosecutors also criminally charged former Vice President Dick Cheney, the CEO of Halliburton, KBR's former parent company, at the time of the TSKJ bribery. In addition to all of the money already paid to U.S. and UK authorities, Halliburton settled with Nigeria for $32.5 million in fines and disgorgement.[13]

U.S. Casting a Wider Net, Including Private Bribery

Recent U.S. FCPA enforcement has focused on charging individuals and prosecuting private commercial bribery. In the *Control Components* case in 2009, two executives of the California company pleaded guilty to conspiracy to violate the FCPA and began cooperating with prosecutors, delaying their sentencing until 2012.[14] The Department of Justice indicted six other Control Components executives, charging them with violating the FCPA, the Travel Act, and other laws. The Travel Act makes it a federal crime to use facilities of interstate or foreign commerce (including telephonic and email communication) in violation of state bribery laws, which generally outlaw private commercial bribery, allowing federal authorities to reach bribery of private parties abroad.

Control Components is accused of using bribery systematically as part of its business model, especially in bids for contracts to supply valves to state-owned companies in numerous countries. The Travel Act charges result from conduct toward non-state-owned companies, including the bribery of an employee of a private Qatari firm. The six individuals who are awaiting trial for corrupt acts on behalf of Control Components include the company's former CEO, Stuart Carson, the former director of marketing for China and Taiwan, Hong "Rose" Carson, and an Italian national, Flavio Ricotti, who marketed the company's products in Europe. Ricotti was extradited to the U.S. from Germany to stand trial, and he is on bail but not allowed to leave the U.S. and paying for electronic monitoring of his own whereabouts.[15]

In 2008, Misao Hioki, a Japanese executive of Bridgestone Corp., a Japanese company and the world's large tire manufacturer, pleaded guilty to violating the FCPA in Latin America.[16] His corrupt dealings involved Bridgestone's U.S. subsidiary and were discovered in the course of a multinational antitrust investigation of the marine hose industry. As part of his guilty plea, Hioki accepted a sentence of 24 months in prison and an $80,000 fine.

German Enforcement Resembling American Measures

Germany, the world's second largest exporter, according to a March 2011 OECD report, has held 69 individuals and 6 legal persons responsible for foreign bribery, including private commercial bribery.[17] German bribery investigations integrate sophisticated methods, including the use of document screening software, undercover agents, and wiretapping, and Germany has used mitigation in sentencing in exchange for cooperation by enforcement targets to great effect. In the *Siemens* case, Germany's largest foreign bribery investigation, Siemens itself employed 400 internal investigators.

Germany, like the U.S. has a foreign bribery law that applies only to corrupt acts to influence foreign government officials; however, also like the U.S., it uses other provisions of law when it has difficulty proving that bribe recipients are foreign government officials. In *Siemens*, the principal offense for which the company was prosecuted was "breach of trust" because of arguments that many recipients of the company's systematic bribery in various countries were not government officials. This is similar to the U.S. Department of Justice's use of the Travel Act.

For more than a year, Munich state prosecutors have been investigating the dealings of Ferrostaal, a German engineering firm that is accused of having acted as a broker, hiring agents to pay bribes on behalf of other companies and its own subsidiaries.[18] Ferrostaal allegedly bribed individuals in Greece and South Africa in exchange for orders from those countries' governments for submarines. In Greece, the bribe was disguised as payment in settlement of a lawsuit (with no apparent basis), and in South Africa, marketing agents were paid 25 percentcommissions that were reflected on generic and unconvincing invoices to be used for bribes. Ferrostaal's chief executive has already resigned.

UK Bribery Act

The most important non-U.S. foreign bribery law for most American companies to understand is the UK Bribery Act of 2010.[19] The UK has jurisdiction over any company that "carries on a business, or part of a business, in any part of the United Kingdom." This includes parent companies of UK subsidiaries, unless the parent companies behave like mere shareholders and do not exercise control over the UK businesses.[20] Firms that have UK subsidiaries or operate directly in the UK are subject to the Bribery Act with respect to their actions everywhere in the world. The Bribery Act imposes strict liability on companies that fail to prevent bribery, irrespective of who committed the corrupt acts and management's intentions and knowledge (or lack thereof).

> Nigerian prosecutors also criminally charged former Vice President Dick Cheney, the CEO of Halliburton, KBR's former parent company, at the time of the TSKJ bribery.

The Bribery Act's prohibitions are similar to those of the FCPA, except the Bribery Act *does* prohibit facilitation payments and private commercial bribery. Facilitation payments are small payments made to low-level government officials to expedite performance of routine governmental functions to which the payer is legally entitled, and they are allowed by an exception in the FCPA. Any American company that does business in the UK needs to have robust measures in place to prevent its employees and third party agents, contractors, and distributors from making facilitation payments on its behalf and from bribing private parties for commercial benefit.

The SFO, which enforces the Bribery Act, has made clear its intention to prosecute foreign bribery aggressively. Even before the Bribery Act was passed, in 2008, the SFO investigated Innospec, Inc., an American manufacturer of fuel additives with a UK subsidiary and charged the subsidiary with "conspiracy to corrupt" for paying "commissions" to marketing consultants who used them to bribe Indonesian government officials for contracts to provide the government with tetraethyl lead.[21] Innospec paid $12.7 million to the UK government to settle the matter. In the era of the Bribery Act, the UK can prosecute companies with UK subsidiaries for much more than the actions of the subsidiaries themselves.

There is an affirmative defense of "adequate procedures" under the Bribery Act. A company that has taken adequate measures to prevent bribery, giving effect to six "principles," cannot itself be punished by the UK for the actions of rogue employees. The principles are: procedures proportionate to the risk of bribery; top-level commitment with a zero tolerance policy toward

bribery, periodic risk assessment; due diligence; training; and monitoring and review of changes in operations. Enforcing the principles within a company requires a dynamic and ubiquitous compliance program that provides employees with the means of continuously assessing and reassessing the risks associated with geographic locations, types of business activities, and particular individuals and companies.

A View to a Cleaner World?

Counsel for multinational corporations and their subsidiaries need to be familiar not only with U.S. and local anti-corruption laws, but also with the OECD and UN foreign bribery treaties. Compliance programs should be tailored to the specific ways in which bribery occurs in each region where companies do business and to maximize companies' chances of mitigating penalties in the event that violations do occur.

What historically was sporadic and U.S.-centric bribery enforcement is becoming widespread, and cooperation among investigating countries should make corporate executives more apt to perform due diligence risk assessments and "just say no." Companies must note the key differences in countries' enforcement strategies. For companies that distribute or use agents or consultants overseas, or, have foreign partners or subsidiaries, this is the time to create or redesign anti-corruption compliance programs and to perform risk assessments of overseas activities. Also, FCPA issues must be added to pre-merger/acquisition due diligence checklists. Companies are acquiring the liability of the target companies and the risks are quite substantial. You do not have to be a Fortune 500 company to be the target of an investigation. Governments are expecting all companies to wake up and train their employees in anti-corruption "red flags." Ignorance is no longer an excuse.

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[1] *See, e.g., U.S. v. Siemens Aktiengesellschaft*, No. 1:08-cr-00367-RJL (D.D.C. 2008), http; *SEC v. Siemens Aktiengesellschaft*, No. 08-CV-02167 (D.D.C. 2008).

[2] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997; United Nations Convention against Corruption, Oct. 31, 2003.

[3] *See* Maksim B. Chester, *Russian FCPA: The Law Has Been Signed, Will The Culture Change As A Result?*, FCPA Professor, June 17, 2011.

[4] Alex Lawson, *U.S. Officials In China To Gather Facts About New Anti-Bribery Law*, Inside U.S.-China Trade, July 27, 2011.

[5] David M. Luna, *Remarks at the U.S.-China Anticorruption Working Group Meetings and Anti-Bribery Roundtable*, Department of State, July 26, 2011.

[6] Criminal Code Amendment (Bribery of Foreign Public Officials) Act (Act No. 43/1999) (Aus.).

[7] *See Japan-Vietnam Joint Committee for Preventing Japanese ODA-related Corruption*, Ministry of Foreign Affairs of Japan, Feb. 2009.

[8] Act on Preventing Bribery of Foreign Public Officials in International Business Transactions, Act No. 5588, Feb. 15, 1999 (S. Kor.).

[9] *United States v. Jeong*, 624 F.3d 706 (5th Cir. 2010).

[10] *United States v. Kellogg, Brown & Root, LLC*, No. 09-CR-71-1 (S.D. Tex. 2009); *United States v. Technip*, No. 10-CR-439 (S.D. Tex. 2010); *United States v. JGC Corp.*, No. 11-CR-260 (S.D. Tex. 2011); *United States v. Snamprogetti Netherlands, B.V.*, No. 10-CR-460 (S.D. Tex. 2010).

[11] *United States v. Tesler*, No. 09-CR-908 (S.D. Tex. 2010).

[12] *United States v. Stanley*, No. 08-CR-597 (S.D. Tex. 2008).

[13] Samuel Rubenfeld, *Halliburton To Pay $35 Million To Settle Nigeria Bribery Charges*, Corruption Currents, Wall Street Journal Blogs, Dec. 21, 2010.

[14] *See United States v. Control Components, Inc.*, No. 09-CR-162-JVS (C.D. Cal. 2009); United States v. Covina, No. 08-CR-336-JVS (C.D. Cal. 2008); *United States v. Morlock*, No. 09-CR-5-JVS (C.D. Cal. 2009).

[15] *See Italian Executive Extradited from Germany to the United States to Face Foreign Bribery Charges*, Department of Justice, July 6, 2010.

[16] *United States v. Hioki*, No. 08-CR-795 (S.D. Tex. 2008),.

[17] OECD Directorate for Financial and Enterprise Analysis, *Germany: Phase 3: Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions*, OECD, Mar. 17, 2011.

[18] See Jörg Schmitt, *Germany's Ferrostaal Suspected of Organizing Bribes for Other Firms*, Spiegel, Mar. 30, 2010.

[19] Bribery Act, 2010 (U.K.).

[20] *See* Serious Fraud Office and Crown Prosecution Service, *Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions*, 2011.

[21] *See* Serious Fraud Office, *Innospec Limited prosecuted for corruption by the SFO*, Mar. 18, 2010; *R. v Innospec Ltd.*, [2010] Crim. L.R. 665 Crown Ct. (Southwark).