



**The Foreign Corrupt  
Practices Act:  
2012 Year-in-Review  
and  
Enforcement Update**

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*A Broader Perspective<sup>SM</sup>*

# Presenters



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# Agenda

- The UK Bribery Act
- FCPA Background
- The New Guidance Manual
- 2012 FCPA Enforcement Review
  - Overview
  - Settlements
  - Trials
  - Dodd-Frank Whistleblower Complaints
  - DOJ Opinion Releases



# **UK Bribery Act Enforcement in 2012**

# The UK Bribery Act

- Came into force 1 July 2011 – prior anti-corruption laws still apply to activities before that date
- Affects UK companies, as well as non-UK companies and their non-UK affiliates that do business in the UK
- Applies to commercial bribery as well as bribery of foreign officials
- No exception for facilitation payments
- Strict liability for corporates unless they can prove adequate procedures

# FCPA and the UK Corruption Laws

- The same acts may be caught by both laws – risk of multiple enforcement actions (Aon, Innospec, BAE, MW Kellogg, DePuy (Johnson & Johnson))
- Cooperation between enforcement agencies, including sharing of results of investigations
- Since 2009 there has been increased UK enforcement under prior corruption and current anti-money laundering laws – major fines and jail time for individuals, as well as civil recovery under money laundering laws
- Although there has yet to be a corporate prosecution under the new UK Bribery Act, these are early days

# SFO Enforcement

- New Director of the Serious Fraud Office (SFO) since April 2012, David Green, has stated an intention to rebalance the relationship between prosecution and civil settlement with an emphasis on criminal investigations and prosecutions
- Strong emphasis on pursuing the most serious cases with links to the UK
  - approach in prosecution of non-UK firms focused on activities that affects level playing field for UK companies – that deprive “ethical” UK firms of a business opportunity
- Other prosecuting agencies (e.g., the Crown Prosecution Service) also have jurisdiction over bribery enforcement – likely to be involved in less high profile cases

# SFO Enforcement

- Investigations
  - New Chief Investigating Officer appointed
  - SFO Whistle Blowing Hotline “SFO Confidential”
  - Use of open source resources, investigative journalism and Suspicious Activity Reports (SARs)
  - Whistleblowers
  - Self reporting
- Several new investigations, including:
  - GPT (ultimately owned by EADS) – Saudi National Guard contract
  - BP – Azerbaijan
  - Rolls Royce

# Shareholder Liability

- Recent use of civil recovery order under the UK's Proceeds of Crime Act (POCA) to recover dividends paid to shareholders that were proceeds from an offence (Mabey & Johnson)
  - This case was unrelated to bribery (UN sanctions violation) and was an agreed settlement, but has the potential for use in bribery situations
  - SFO stated intention to seek similar orders in the bribery context, with focus on dividends received by institutional investors which are better able to conduct due diligence on companies in which they invest
    - Oxford Publishing Limited civil recovery order for dividends generated through improper payments of subsidiaries in Tanzania and Kenya (July 2012)

# Voluntary Disclosures

- Withdrawal of prior guidance to emphasize SFO's primary role of investigator and prosecutor of serious and complex fraud, including corruption
- Confirms the SFO still encourages self-reporting and will consider civil recovery where the requirements of the Full Code Test are not met
- No guarantee of no prosecution
- It is not the role of the SFO to provide advice about future conduct

# Civil Recovery Orders

- Current uncertainties in the UK about plea bargaining
- In light of the difficulty with plea bargains, since *Innospec*, the SFO has resolved foreign bribery enforcement actions against corporate defendants exclusively through consent civil recovery orders under POCA
  - OECD has criticised the lack of transparency in respect of civil settlements
  - The *Innospec* court questioned whether serious crimes should be settled civilly rather than criminally, although the question of whether to prosecute remains with the prosecutor

# Plea Bargains, DPAs

- Government consultation on introducing legislation to allow deferred prosecution agreements for companies (but not individuals) to add to the tools available to the SFO and other prosecuting agencies
  - Contemplates hands-on judicial involvement
  - Agreed statement of facts (no admission of guilt per se, but may be implicit in statement of facts)
  - Sharing of information? Privilege issues?
  - Stay of criminal charges -- avoidance of mandatory debarment (but possible discretion to impose)
- Draft legislation in Crime and Courts Bill, working its way through Parliament – Royal Assent expected April 2013 and implementation in 2014

# International Cooperation

- Other countries have stepped up their enforcement efforts:
  - Canada, France, Germany, Greece, Nigeria, Switzerland, the United Kingdom
- DOJ/SEC recognized cooperation with the following countries' enforcement agencies:
  - France, Germany, Greece, Hungary, Italy, Macedonia, Switzerland, the United Kingdom



# FCPA Background

# Structure of FCPA

## Antibribery Provisions

- Prohibits bribery of foreign government or political officials for the purpose of obtaining or retaining business or securing any improper business advantage
- Mainly enforced as criminal violations by the Department of Justice

## Books and Records Provisions

- Requires SEC-registered or reporting issuers to make and maintain accurate books and records and to implement adequate internal accounting controls
- Mainly enforced as civil violations by the Securities and Exchange Commission

# Books and Records

- Books, records, and accounts must be kept “in reasonable detail”
  - Level of detail that would satisfy prudent officials in the conduct of their own affairs
  - No materiality threshold
  - Bribes are often concealed as legitimate payments, such as consulting fees, marketing expenses, travel and entertainment, or discounts
- System of internal accounting controls
  - The processes in place to ensure accurate financial reporting
  - Includes the organization’s “tone,” risk assessments, and control activities such as approvals, authorizations, segregation of duties, etc.
  - An effective compliance program is a critical component of internal controls
- SEC will look to see if there are potential reporting and anti-fraud violations that accompany the FCPA violation
- There can be criminal liability for accounting violations

# Antibribery Prohibited Acts

- It is unlawful for
  - an “issuer,” “domestic concern,” or “any person acting within the territory of the United States”
  - with “corrupt intent”
  - directly or indirectly
  - to offer, pay, promise to pay, or authorize payment
  - of “anything of value”
  - to a “foreign official”
  - for the purpose of obtaining or retaining business

# To Whom Do the Antibribery Provisions Apply?

- Any “**issuer**” that files reports to the SEC or trades equity or debt on a U.S. exchange
  - Includes any foreign company that trades, for example, American Depository Receipts (ADRs), on a U.S. exchange.
- Any “**domestic concern**”
  - Includes U.S. citizens, nationals, and residents as well as any entity (corporation, partnership, etc.) that is organized under the laws of the United States or a U.S. territory or that has its principal place of business in the United States.
- Any “**person**,” including an organization, wherever located, that, while in the territory of the United States, does any act in furtherance of the prohibited conduct
  - Government argues minimum contacts include emails, telephone calls, transfers through correspondent bank accounts in U.S. intermediary banks



***A Resource Guide to the U.S.  
Foreign Corrupt Practices Act***

# The FCPA Guidance Manual

- Released after more than a year
- Not a light read
  - 120 pages
  - 418 footnotes
- Meant to be a resource
- Not meant to limit government enforcement efforts
- Does not modify the existing program
- Contains many hypotheticals – none of which could be called close calls

# Key Points

- Not just the DOJ and the SEC enforcing FCPA – other domestic agencies and international partners
- Emphasis on unlimited jurisdictional reach
  - Parent-subsubsidiary liability
  - Conspiracy, aiding and abetting, and agency
  - Other statutes to reach same conduct
- No relief for the Chamber of Commerce concerns
  - Definition of foreign official, successor liability, adding compliance defense, limited subsidiary liability
- Provides enforcement principles

# Practical Advice

- No new insights, but useful resource for compliance tips and practical advice on:
  - Entertainment and travel
  - Gifts
  - Facilitation payments
  - Charitable contributions
  - Extortion or duress
  - Compliance programs, including risk assessments
  - Due diligence
    - Agents and third parties
    - Joint ventures
    - Acquisitions

# Warnings to foreign companies and individuals

- “Thus, for example, a foreign national who attends a meeting in the United States that furthers a foreign bribery scheme may be subject to prosecution, as may any co-conspirators, even if they did not themselves attend the meeting.”
- “A foreign national or company may also be liable under the FCPA if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the United States.”



# **Enforcement Review**

# Overview

- Noticeable slowdown in 2012
  - 12 SEC cases and 11 DOJ cases (down from about 50 total in 2011)
- Beginning to see the results of industry sweeps
  - 5 settlements in the pharma/medical device industries
- Beginning to see signs of foreign bribery laws by some OECD countries
- 88 public companies disclosed the existence of FCPA investigations

# Corporate penalties not as large as 2011

- 2011 total – \$508.6 million
- 2012 total – \$259.4 million
  - Pfizer Inc. – \$60 million; criminal/civil; two-year DPA
  - Marubeni Corporation – \$54.6 million; criminal; two-year DPA
  - Eli Lilly (Russia, China, Brazil, Poland) – \$29.4 million; civil
  - Tyco International Ltd. – \$26 million; criminal/civil
  - Biomet Inc. – \$22.8 million; criminal/civil; DPA with a compliance monitor for 18 months
  - Smith & Nephew – \$22.2 million; criminal/civil; DPA with a compliance monitor for 18 months
  - Allianz SE – \$12.4 million; civil
  - BizJet International Sales and Support Inc. – \$11.8 million; criminal; three-year DPA
  - Data Systems & Solutions LLC – \$8.8 million; criminal; two-year DPA
  - Orthofix International N.V. – \$7.4 million; criminal/civil; three-year DPA
  - Nordam Group Inc. – \$2 million; criminal; three-year NPA
  - Oracle Corporation – \$2 million; civil

# FCPA enforcement is here to stay

- “Corporate bribery is bad business” and “Corruption is also bad for business”
  - Guidance Manual
- “We are unequivocally opposed to weakening the Foreign Corrupt Practices Act. We don’t need to lower our standards. We need to work with other countries to raise theirs.”
  - Secretary of State Hillary Clinton, Transparency International-USA's Annual Integrity Award Dinner, March 22, 2012
- “I want to be clear about one thing with respect to [proposals to amend the FCPA]: we have no intention whatsoever of supporting reforms whose aim is to weaken the FCPA and make it a less effective tool for fighting foreign bribery.”
  - Ass’t Attorney General Lanny Breuer, November 8, 2011

# Wal-Mart Investigation

- New York Times reported allegations of pervasive payments in Mexico related to governmental permission to build stores
- Reports of an internal investigation in 2005-06 that uncovered payments, but that nothing was done to change the practice or discipline individuals
- Wal-Mart cooperating with DOJ/SEC
  - Also received letter from Congress
- Shareholder suits filed
- Current internal investigation reportedly covers conduct all over the world



# 2012 Settlements

# Tyco International – Sept. 2012

- Settled an accounting fraud matter with SEC in 2006
  - Paid a \$50 million penalty and agreed to conduct a comprehensive review
  - Included allegations of bribes in Brazil and South Korea
- Current matter resulted from the review
- Middle eastern subsidiary pleaded guilty to conspiracy to violate FCPA by bribing officials at Saudi Aramco
- Tyco receives a non-prosecution agreement, but pays \$26 million in criminal and civil penalties

## Biomet Inc. – March 2012

- Deferred prosecution agreement with DOJ (\$17.3 million criminal penalty, \$5.4 million disgorgement)
- “Biomet’s misconduct came to light because of the government’s proactive investigation of bribery within the medical device industry”
  - Kara Novaco Brockmeyer, Chief of the SEC’s Enforcement Division’s FCPA Unit
- “Biomet’s compliance and internal audit functions failed to stop the payments to doctors even after learning about the illegal practices.”
- “The Agreement recognizes Biomet’s cooperation with the department’s investigation; thorough and wide-reaching self-investigation of the underlying conduct; and the remedial efforts and compliance improvements undertaken by the company. In addition, Biomet received a reduction in its penalty as a result of its cooperation in the ongoing investigation of other companies and individuals.”

## Pfizer – August 2012

- Payments to hospital administrators and regulators in Bulgaria, Croatia, Kazakhstan and Russia (among others) to obtain approval, registration and increased sales of Pfizer products
- Voluntary self disclosure allegedly led to reduced penalty
  - Additional SEC charges against Pfizer for violations at Wyeth prior to its acquisition by Pfizer
  - DOJ declined to prosecute Pfizer for Wyeth's pre-acquisition conduct due to the extensive compliance remediation effort post-acquisition
- Total penalty and disgorgement – \$60 million

## Oracle – August 2012

- SEC does not allege that bribes were actually paid
- Oracle India entered into \$3.9 million deal, but received payment of only \$2.1 million
  - “Parked” \$1.7 million with distributors for “marketing development purposes”
  - Oracle India employees provided false invoices to the distributor to support the “parked” funds
- The SEC alleges that the “parked” funds created a risk that the money could be used for bribery in violation of FCPA
- Voluntary disclosure that led to a \$2 million penalty

## Eli Lilly & Co. – Dec. 2012

- Civil settlement only – \$29.4 million (\$13.9 million disgorgement, \$6.7 million prejudgment interest, \$8.7 million penalty)
- Reaches back to conduct as far back as 1994
  - Russia, China, Brazil and Poland
  - “Employees at Lilly’s subsidiary in China falsified expense reports in order to provide spa treatments, jewelry, and other improper gifts and cash payments to government-employed physicians”
- Importance of due diligence
  - Lilly knew “little or nothing about the third parties beyond their offshore address and bank account information.”
- Includes charitable donation made in Poland (the same charity that tripped up Schering Plough)
- Lilly retains an independent compliance consultant

# Noteworthy Declination

- Morgan Stanley
  - Employee (Garth Peterson) pled guilty to conspiracy to bribe Chinese official to get business for Morgan Stanley.
  - When this information came to light, MS hired counsel, conducted an investigation and disclosed the results to the government.
  - MS showed that it had a pre-existing, effective and evolving compliance program.
  - Peterson acted on his own, and he and the Chinese official were also stealing from MS.
  - MS was not charged with violating FCPA.

# Other Settlements

- Orthofix International N.V.
  - FCPA training only in English – not effective for Mexican operations
  - Failure to investigate substantial overage in travel and promotional expenses
- Nordam Group Inc.
  - Privately-held company so no SEC enforcement action
  - Small fine below guidelines range based on company's inability to pay larger fine



# 2012 FCPA Trials

# Defense Victories

- 22 Defendants in SHOT Show case
  - 2 Trials – 2 Not Guilty; 1 Dismissed; 7 Hung Jury
  - 3 guilty pleas
  - Court dismissed entire case against all 22 defendants
- Lindsey Manufacturing
  - Jury convicted, but Court vacated on prosecutorial misconduct grounds (DOJ has appealed)
- Daniel O’Shea
  - Court granted O’Shea’s motion for judgment of acquittal
  - “While the Government does not have to trace a particular dollar to a particular pocket of a particular official, it has to connect the payment to a particular official, that the funds made under his authority to a foreign official, who can be identified in some reasonable way, that is, with no reasonable doubt. . . .”

# Convictions/Sentencings

- Haiti Telco case
  - Jean Rene Duperval (former Haiti Telco official) convicted of money laundering
  - Joel Esquenazi convicted of FCPA violations and received 180-month sentence
- Bonny Island case
  - Jack Stanley sentenced to 30 mo. prison + \$10.8 million penalty
  - Jeffrey Tesler sentenced to 21 mo. prison + \$149 million forfeiture
- Control Components, Inc. case
  - Dave Edmonds – 4 mo. prison + 4 mo. home det.
  - Stuart Carson – 4 mo. prison + 8 mo. home det.
  - Hong Carson – 6 mo. home det.
  - Paul Cosgrove – 13 mo. home det.

# Dodd-Frank Whistleblower Provisions

- Whistleblowers who
  - “Voluntarily” provide the SEC with
  - “Original information”
  - That leads to a “successful enforcement” action in a federal or administrative court
  - That results in monetary sanctions greater than \$1,000,000
- Are entitled to a mandatory award from the SEC between 10 and 30 % of the monetary sanctions

# Whistleblower Rules

- In year 1, the SEC received 2870 whistleblower tips
- Approximately 30% were reported anonymously through counsel
- Only about 4% related to FCPA
- The SEC recently made their first payment - \$50,000 on a matter where they thus far have collected \$150,000
  - The person reported an ongoing scheme, turned a pre-existing investigation in a new direction, and had no culpability

# Whistleblower Rules

- They are now in year 2
- The SEC claimed to have 300 more cases from whistleblowers with possible sanctions over \$1 million that they were reviewing
- The SEC is building anti-retaliation questions into their investigations and anticipates that there may be future enforcement actions alleging violations of the anti-retaliation provisions

# DOJ Opinion Releases

- Op. No. 2012-01
  - Lobbying firm wanted to retain consulting group that had a partner who was a member of royal family, with no government position
  - “fact-intensive, case-by-case determination” including, among others,
    - “the structure and distribution of power . . .; a royal family’s current and historical legal status and powers; the individual’s position within the royal family; an individual’s present and past positions within the government; . . . an individual’s ability, directly or indirectly, to affect governmental decision-making; and numerous other factors”
- Op. No. 2012-02
  - 19 non-profit adoption agencies to pay for expenses for trip to U.S. for 18 foreign officials
  - Follows the traditional reasonable and bona fide analysis



# Questions and Answers

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