

The FCPA, the SEC's Revamped Enforcement Program and the New Whistleblower Rules

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*A Broader Perspective*SM

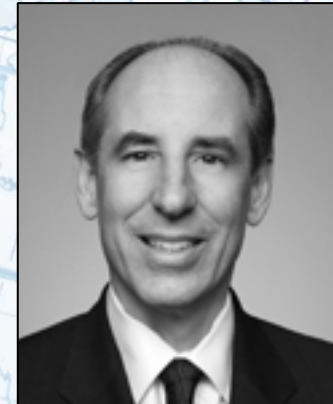
Today's Presenters



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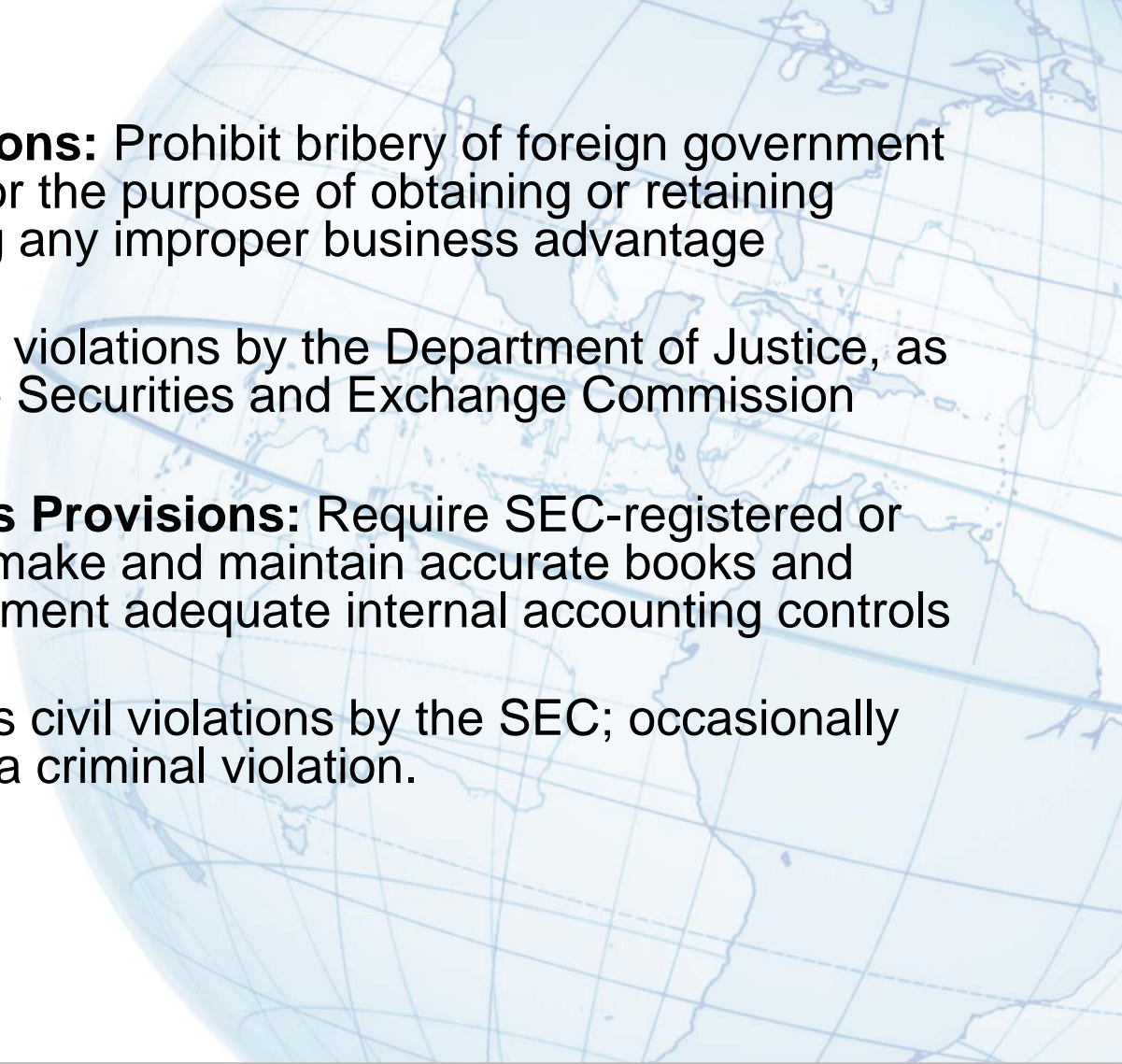
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Topics for Discussion

- FCPA Enforcement: Overlapping Jurisdiction
- Recent SEC FCPA Enforcement Actions
- The SEC's Revamped Enforcement Program
- Whistleblower Rules Under Dodd-Frank
- Implications



**FCPA Enforcement:
SEC/DOJ Overlapping
Jurisdiction**

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- **Antibribery Provisions:** Prohibit bribery of foreign government or political officials for the purpose of obtaining or retaining business or securing any improper business advantage
 - Enforced as criminal violations by the Department of Justice, as civil violations by the Securities and Exchange Commission
 - **Books and Records Provisions:** Require SEC-registered or reporting issuers to make and maintain accurate books and records and to implement adequate internal accounting controls
 - Typically enforced as civil violations by the SEC; occasionally included by DOJ as a criminal violation.

Managing the Jurisdictional Overlap

- High degree of coordination between SEC and DOJ
- Who takes the lead? What factors are considered?
 - Differing standards of proof
 - The "nature" of the conduct: is it "essentially criminal"?
 - The culpability of individuals and their positions within the company
- Simultaneous proceedings/settlements
 - Non-prosecution and deferred prosecution agreements
 - Available remedies/settlement terms
 - Incarceration
 - Civil and criminal monetary penalties
 - Disgorgement
 - Equitable relief (e.g. officer and director bars)
 - Undertakings: Compliance agreements and appointment of "special masters" or "monitors"



Recent SEC FCPA Enforcement Actions

- In 2010, the SEC concluded 28 cases, which involved approximately \$525 million in disgorgement and civil monetary penalties as well as non-monetary measures such as compliance program monitoring by the SEC.
 - Technip (\$98 million) and ENI, S.p.A./Snamprogetti Netherland B.V. (\$125 million) – alleged bribery of Nigerian officials for construction contracts.
 - Daimler AG (\$91.4 million) – alleged bribery involving vehicle contracts in Asia, Africa, Eastern Europe and the Middle East.
- So far, in 2011, the SEC has concluded 9 cases with more than \$76 million in disgorgement and civil monetary penalties.
- At the beginning of the year, however, more than 70 filing companies reported existence of government FCPA investigations.

- In 2011, to date, the SEC has concluded 9 cases with more than \$76 million in disgorgement and civil monetary penalties.
 - Rockwell Automation (\$1.8 million) – books and records and internal controls violations in connection with potentially excessive payments for legitimate services and inappropriate payments of travel and entertainment expenses in China
 - Johnson & Johnson (\$70 million) – alleged bribery of doctors and hospital administrators employed by the government in several European countries; payment of kickbacks under U.N. Oil for Food program
 - IBM (\$10 million) – books and records and internal control violations in connection with improper cash payments, gifts and travel and entertainment expenses to officials in South Korea and China
 - Tyson Foods (\$5 million) – improper payments to Mexican government veterinarians to certify products for export
- More than 70 companies have reported that they are involved in government FCPA investigations.



SEC's Revamped Enforcement Program

Key Components

- “Flattened” Organizational Structure
- “Specialized” Units
- Streamlined Processes
- Cooperation Initiative

Restructuring SEC Enforcement

“The restructuring, while composed of many initiatives, had some common goals – to make us smarter about the products, markets, transactions and practices that we police; to make us quicker to stop fraud and misconduct before it’s on the front page and all the investor money is squandered; to make us more efficient in how we use our resources, thus allowing us to do more within existing budgets; and to maximize our deterrent impact by moving quickly to address newly-emerging threats before they take hold across entire business lines or even industries.”

Robert Khuzami
Director, Division of Enforcement
SEC

SEC FCPA Unit

“A primary mission of this Unit is to devise ways for us to be more proactive in our enforcement of the FCPA. Members of the FCPA Unit will gain in-depth knowledge of industries and regional practices so we can uncover corrupt practices that might otherwise go undetected. We will also conduct more targeted sweeps and sector-wide investigations, alone and with other regulatory counterparts both here and abroad.”

Cheryl J. Scarboro
Chief, SEC FCPA Unit

The SEC FCPA Unit

- 13 supervisory staff assigned to unit
- Numerous staff attorneys and accountants conducting investigations
- 4 Locations
 - DC
 - Miami
 - Los Angeles
 - San Francisco

SEC Enforcement Cooperation Initiative

- Announced January 13, 2010 (Revising earlier "Seaboard" factors for cooperation by corporations announced in 2001)
- Described as “potential game changer” for the Enforcement Division
- New cooperation tools give staff flexibility in providing incentives to companies and individuals to come forward with information early in the investigative cycle
- Initiative also sets out criteria for determining value of individual cooperation and establishes more streamlined process for witness immunity requests

New Cooperation Tools


- **Proffer agreements**
 - Agreement that SEC will not use individual statements in subsequent proceeding; the cooperation process always begins with a proffer
- **Cooperation agreements**
 - Individual/company can receive specific credit for information provided to SEC
- **Deferred prosecution agreements**
 - Allows SEC to agree, as does DOJ, to forego an enforcement action against individual/company on certain conditions
- **Nonprosecution agreements**
 - Like DPAs, but with fewer strings attached
- **Immunity requests**
 - SEC can seek immunity orders/letters from DOJ to compel/induce witnesses to cooperate

First SEC Use of Non-Prosecution and Deferred Prosecution Agreements

- First Non-prosecution Agreement: *Carter's, Inc.* (January 19, 2011). SEC alleged that a children's clothing manufacturer engaged in financial fraud unrelated to FCPA.
- First Deferred Prosecution Agreement: *Tenaris S.A.* (May 17, 2011). SEC alleged that a pipe supplier for the oil and gas industry bribed Uzbek officials. In addition to the DPA, Tenaris agreed to disgorgement of \$5.4 million plus interest.



Whistleblower Provisions Under Dodd-Frank Act

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- Regulations proposed November 3, 2010 to implement DFA §922
 - Final regulations adopted by 3-2 vote May 25, 2011 (effective 60 days after published in the Federal Register)
 - Codified as Securities and Exchange Act §21F

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

When is Information Provided “Voluntarily”?

- Provided “before a request, inquiry, or demand [by the SEC or certain other authorities] that relates to the subject matter of your submission is directed to you [or your attorney]”
- Not voluntary if the whistleblower is required to report the information to the SEC due to a legal duty or a contractual duty owed to the SEC or certain other authorities

What is “Original Information”?

- Information about a “possible violation” of federal securities laws derived from “independent knowledge or independent analysis”
- Not already known by the SEC unless the provider is the original source
- “Independent knowledge” is “factual information in your possession that is not derived from publicly-available sources”
- “Independent analysis” is one’s own examination of information (including public) that reveals information not generally known or available to the public

“Original Information” is Not:

- Information obtained through attorney-client privileged communications or through legal representation of a client
 - **Unless** disclosure is otherwise permitted by SEC and state rules
- Information (a) an officer, director, trustee or partner of the entity at issue learned from someone else or through the entity’s process for identifying violations, (b) obtained by compliance or audit personnel, (c) obtained by personnel otherwise investigating violations or (d) obtained by certain public accounting firms, **unless**
 - There is a “reasonable basis” to believe the relevant entity will cause “substantial injury” to its or its investors’ “financial interest or property” or the entity will impede an investigation of the misconduct or
 - 120 days has elapsed since the information was provided to one of several designated contacts within the entity
- Information obtained in a manner that violates a criminal law

What is "Information that Leads to a Successful Enforcement Action"?

- Information that is “[s]ufficiently specific, credible, and timely to cause the staff to commence an examination, open an investigation, reopen an investigation ... or to inquire concerning different conduct as part of a current examination or investigation”
- Information that leads to the SEC bringing a judicial or administrative action that results in a monetary sanction based at least in part on conduct that was the subject of the original information
- If the original information was about conduct already under examination or investigation, the information qualifies if it “significantly contributed to the success of the action”

What Amounts Are Counted Toward the \$1,000,000?

- Monetary sanctions from any administrative or judicial proceedings the SEC brings that “arise out of the same nucleus of operative facts”
- Includes penalties, disgorgement and interest
- Can also receive an award based on certain non-SEC judicial or administrative actions based on the same original information
- Doesn't include amounts whistleblower has to pay due to own culpability or amounts an entity has to pay due to whistleblower's conduct

Calculating the Amount of an Award

- At least 10% but SEC discretion thereafter, to a maximum of 30%
- SEC must consider factors that may increase the award:
 - Significance of the information to action's success
 - Whistleblower's assistance
 - Law enforcement interest
 - Whistleblower's efforts to involve company's internal compliance program
- SEC must consider factors that support not increasing award greater than 10%:
 - Culpability
 - Reporting delay
 - Interference with internal compliance program

No Retaliation, No Amnesty

- Employer can't retaliate against a whistleblower who had a "reasonable belief" that the information provided to the SEC related to a "possible securities law violation"
- SEC is not required to provide amnesty for whistleblower's own conduct in exchange for information

Implications for FCPA Investigations

- Information whistleblowers provide may turn out to be particularly important in FCPA investigations:
 - Successful FCPA investigations often require an insider to explain transactions, where evidence resides, involvement and roles of actors etc. In addition, much of the evidence is likely to be overseas or otherwise difficult to obtain/understand
 - Large penalties in FCPA matters may result in large whistleblower awards

The Effect on Internal Compliance Programs

- Does the SEC's Whistleblower program undermine internal compliance programs?
- No requirement to report through internal compliance program for whistleblower award
- Priority is on SEC obtaining information needed for enforcement
- SEC says participation in internal compliance programs encouraged through:
 - Increased award credit if report through internal compliance program
 - Have 120 days to report information to SEC after reporting to compliance program and get credit for information employer might report to SEC

What Should Your Company Do?

- Effective compliance programs & internal controls more important than ever
- Internal reporting mechanisms – ensure personnel have confidence they are effective
- Internal investigations
 - Launched when possible whistleblower information is detected or reported internally
 - Speed and thoroughness become particularly important
 - Decisions as to whether to “self-report”
- No retaliation

Greater Incentives for Self-Reporting?

- Not always the answer but considerations have changed
- Increased uncertainty as to what the government knows
- Avoid losing opportunity to receive mitigating credit
- Explain facts before government's impressions develop
- Minimize loss of control of subsequent steps

Upcoming Webinars

- Anti-Corruption 2011 Mid-year Enforcement Update – Analyzing the Trends in Global Enforcement
- Specific Issues in Anti-Corruption Investigations – When to Conduct, How to Conduct, Remediation and Possible Disclosure
- Anti-Corruption Investigations in Asia
- The U.K. Bribery Act – How to comply with the latest Anti-Corruption Law



Questions & Answers