

2011: What Lies Ahead for Anticorruption Laws

Law enforcement efforts against corruption in international business transactions gained enormous momentum in 2010. U.S. authorities continued to bring unprecedented numbers of cases and collect ever-higher fines and penalties for violations of the Foreign Corrupt Practices Act (“FCPA”), while the United Kingdom undertook a wholesale revision of its antibribery laws to make them even more rigorous than the FCPA. For 2011, the risks of running afoul of these laws, and the consequences of doing so, have never been greater.

United States

U.S. authorities have designated FCPA violations as a top law enforcement priority—one that they often mention in the same breath with the fight against international terrorism.

More cases, bigger penalties. Viewed strictly by the numbers, FCPA enforcement continued to increase exponentially, as it has over at least the past five years. Both the Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) have increased the resources devoted to pursuing FCPA violations, and public reports indicate that there are at least 140 open investigations against companies and individuals. These agencies brought a total of 74 actions in 2010—up from an average of 37 per year in 2007-2009, and approximately 11 per year in 2004-2006. By way of comparison, U.S. authorities had brought only 19 enforcement actions from the enactment of the statute in 1977 to 2004.

The cases brought in 2010 increasingly stressed the criminal prosecution of individuals, with the prospect of individual fines and significant prison time, and the imposition of ever-greater fines on companies. By way of example, in 2010, U.S. authorities levied eight of the ten

largest FCPA penalties ever paid, ranging from \$56 million to \$400 million; one company was dissolved by court order as a “criminal purpose organization,” and one individual received an 87-month prison sentence—the longest prison sentence ever imposed in an FCPA case.

If anything, however, these numbers understate the lengths to which U.S. authorities will go to pursue these matters.

Aggressive enforcement tactics. U.S. authorities are now employing the kinds of investigative methods previously reserved primarily for narcotics and organized crime cases. Nearly one-third of the FCPA actions brought in 2010 resulted from a single sting operation, in which FBI agents posed as representatives of a foreign defense minister. It should be expected that the authorities will also use video and audio surveillance, wiretaps, paid undercover informants, undercover agents, and grants of immunity, to build FCPA cases.

Expansive jurisdiction and creative legal theories. U.S. authorities have not shied away from pursuing cases at the very edges of their jurisdictional reach. The FCPA provides for the prosecution of corrupt payments to foreign officials on the basis of U.S. citizenship or a relatively minimal connection to the U.S. In a number of recent cases, however, the U.S. nexus appears to have been particularly slim (if not non-existent).

U.S. authorities have been keen to make an example of those it believes to have made improper payments, even where there appears to be little or no basis for FCPA jurisdiction (or insufficient evidence to satisfy all of the FCPA’s elements), by stretching the limits of statutory jurisdiction or asserting charges of other violations of law. For example, after British authorities initially declined to bring



bribery charges against British aerospace manufacturer BAE plc, U.S. authorities reached a \$400 million criminal settlement with the company. In light of what appeared to be a lack of basis for FCPA jurisdiction (or perhaps an inability to prove an FCPA case), the U.S. charged the company with making false statements to various U.S. agencies about its anticorruption compliance program and with failing to disclose to those agencies certain commissions paid on foreign arms sales, and in conspiracy to defraud the U.S. government. Indeed, though the apparent motivation for the charges was a belief that bribe payments had been made (and the plea agreement reads like a bribery scheme), authorities did not charge any FCPA violation.

Bounty payments for whistleblowers. U.S. authorities also anticipate receiving a significant increase in information about potential FCPA violations as a result of the Dodd-Frank whistleblower provisions, which create substantial monetary incentives for individuals to report potential wrongdoing under a variety of laws, including the FCPA. Those who provide independent information leading to a successful enforcement action in which the government obtains monetary penalties of \$1 million or more will be paid a “bounty” ranging from 10 to 30 percent of the total amount.

and even changing employee schedules depending on the situation.

The 3PL solution

Third-party logistics providers can be more effective than individual shippers because they have accumulated benchmarking data and best practices from throughout the supply chain, and also have a wide range of relationships that run the depth and breadth of the supply chain. Consequently, “We can still save our customers money despite a fragmented market,” Waggoner of Echo Global Logistics says.

A comprehensive 3PL can go beyond simply comparing shippers. BravoSolution’s Hall says the best can extend deep into the client company, tracking where funds are spent in the supply chain, with whom

and for what. A global 3PL may even tap into its network of local knowledge to help identify a potential supplier for a client and help evaluate certain aspects of their performance.

Whatever the 3PL’s role in the client company, “The goal is to get the best balance of price and service,” Hall says. To facilitate that, 3PLs tend to work very closely with the shipper.

Echo Global Logistics assigns dedicated teams to its enterprise customers. Those teams either work on-site or at Echo’s headquarters, getting to know the customer, their products, and preferences so they can present the best options for that individual client. “It’s very much about optimization,” Waggoner stresses.

At Con-way, “We share a facility with one of our shippers,” reveals Tommy Barnes. In that instance,



There is widespread concern that this program will undercut the effectiveness of anti-corruption compliance efforts, as potential violations may be reported to the authorities in the first instance, rather than to company officials seeking to identify and address such activity. Whether or not this is the case, it seems certain that the SEC and the DOJ will have an abundance of tips, and that companies will have even more at stake in seeking to prevent FCPA violations in the first place.

United Kingdom

The UK's new Bribery Act (the "Act"), which is scheduled to take effect in April 2011, provides for civil and criminal penalties even greater than those that may be imposed by U.S. authorities under the FCPA. Several components of the Act are particularly significant.

- **Broad jurisdiction.** The Act provides for new and very expansive jurisdiction over companies doing business in the UK, which can be prosecuted for bribery undertaken on their behalf without regard to where it occurs. It is not precisely clear what will constitute "doing business" for this purpose, but the threshold is sure to be low.
- **Strict corporate liability.** Companies subject to the Act will be strictly liable for bribes given or offered on their behalf, by any person, acting anywhere in the world, and without regard to whether anyone in the company had knowledge of the bribe. This means that it will be easier for UK authorities to prove a violation of the Act than for U.S. authorities to establish an FCPA violation.
- **Adequate procedures defense.** Unlike the FCPA, the Act provides a complete defense

to strict corporate liability where a company can establish that it had "adequate procedures" to prevent corrupt payments from occurring. This creates a compelling reason for companies to ensure that they have effective compliance mechanisms to prevent improper payments.

- **Commercial bribery.** The Act covers not only improper payments to foreign government officials, but private commercial bribery as well.

UK authorities can be expected to make use of their new powers under the Act, as they brought significantly more anticorruption cases in 2009 and 2010 than in prior years. That said, there are major uncertainties, such as the following, about what this will mean in 2011 and coming years:

- **Jurisdiction over non-UK companies.** How aggressively will the UK authorities interpret their authority to pursue allegations of corrupt payments by companies with a minimal business presence in the UK, where the payments have no other connection to the UK?
- **Facilitating payments.** Will UK authorities bring charges against companies making facilitating payments? Unlike the FCPA, the Bribery Act makes no exception for such payments.
- **Gifts and entertainment.** Will UK authorities provide clarity on permissible business gifts and entertainment, given that the Act appears to prohibit them entirely? Thus far, the authorities have advised companies to trust in proper prosecutorial discretion.
- **Enforcement resources.** Given its massive budgetary crisis, which has already led to social unrest, will the UK Government

devote significant resources to the pursuit of foreign bribery cases, particularly those at outer reaches of the Act's authority?

Other OECD countries

International efforts against corruption date from the 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which was entered into by the member states of the Organization for Economic Cooperation and Development ("OECD"). While all 38 member states had, by 2002, adopted laws similar to the U.S. FCPA, the enforcement of those laws varies greatly from country to country.

The U.S. was the driving force behind the OECD Anti-Bribery Convention, with a primary objective being to "level the playing field" abroad for U.S. companies subject to the FCPA. That goal remains a distant one, notwithstanding the efforts of the U.S. and the UK. A 2010 report by Transparency International indicated that only five other OECD members were actively enforcing those laws—Denmark, Germany, Italy, Norway, and Switzerland. The report noted that there was little or no enforcement activity by 20 of the 38 OECD member states, and only moderate levels in the remaining ones.

Whether in fact the playing field will ever be leveled will depend on whether these and other nations have the political will to prosecute matters involving international corruption. That seems, at best, unlikely at a time when the solvency of many national governments appears to be at risk.

The authors are employed by the global law firm K&L Gates LLP, which comprises nearly 2,000 lawyers who practice in 37 offices located on three continents.

the Con-way team and the shipper's team are in the same office, functioning as a single entity, Barnes says. Con-way maintains a close relationship with its other shippers, too, working as a team, sharing best practices and contributing to clients' one-, three- and five-year vision to help ensure that customers and 3PL are, as Barnes says, "marching towards the same goals."

The overlying trend for the foreseeable future is the volatility in the marketplace. To thrive, "You have to understand the marketplace and understand where you want your company to be positioned," Barnes says. For shippers, that means always being prepared to either outsource part of the business or to develop the expertise and resources internally.

"The transportation industry doesn't like to think of itself as a commodity, but shippers think of them that

way," says Echo's Waggoner. Traditionally, "There's not a lot of value creation in transportation, but there's lots of opportunity to screw up."

Third-party logistics providers have evolved—and are continuing to evolve—from carrier brokers to partners that bring best practice of many industries, and a wealth of technology to today's challenging environment. They are, therefore, uniquely placed to add value and minimize the 'screw-ups.' **WT**

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