
Recent Developments in Global Antibribery Enforcement

2010-07-22

Recent weeks have brought legislative developments relevant to antibribery enforcement and compliance on both sides of the Atlantic. In the U.S., the new financial reform legislation includes whistleblower provisions that are applicable to all securities laws violations, including violations of the Foreign Corrupt Practices Act (FCPA). In the U.K., the Ministry of Justice (MOJ) has announced a timeline for the commencement of the U.K. Bribery Act and the development of guidelines on antibribery procedures for commercial organizations. On the enforcement front, the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) have concluded several enforcement actions.

Financial Reform Bill Containing SEC Whistleblower Protections Becomes Law

On Wednesday, July 21, 2010, President Obama signed into law the Wall Street Reform and Consumer Protection Act. The final version of the bill contains a provision providing for remuneration to whistleblowers who report information to the SEC that leads to the imposition of "monetary sanctions" in any "covered judicial or administrative action," meaning any judicial or administrative action brought by the SEC under the securities laws that results in monetary sanctions exceeding \$1,000,000. Whistleblowers will receive "not less than 10 percent" but "not more than 30 percent" of the monetary sanctions. The new law directs the SEC to promulgate regulations fleshing out how the award is calculated and what other relevant factors should be taken into consideration in doing so.

Whistleblowers cannot recover, however, if they are convicted of criminal violations related to the matter which they report. Likewise, individuals are prohibited from qualifying as whistleblowers if the information they uncover is gained "through the performance of an audit of financial statements required under the securities laws and for whom such submission would be contrary to the requirements of section 101A of [the Act], (15 USC 78j-1)," meaning that most external auditors cannot be whistleblowers under the new law.

The law also contains protections for SEC whistleblowers. Employers cannot retaliate ("discharge, demote, suspect, threaten, harass, directly or indirectly, or in any other manner discriminate")

against whistleblowers because of any lawful act done by the whistleblower in providing information to the SEC or assisting in the SEC's investigation. A whistleblower who has been discriminated against may bring suit in federal court and may receive reinstatement, double back pay, and attorneys' fees.

The immediate practical effect of the financial incentives in the new law is likely to be an uptick in FCPA whistleblowing by employees. And because the law applies to SEC "monetary sanctions" over \$1 million, the vast majority of FCPA settlements will be covered by the law. The law also changes the calculus for companies weighing the decision whether or not to voluntarily disclose possible FCPA violations and may perhaps tip the balance towards self-reporting for fear of losing the opportunity to get credit for voluntary disclosure if a whistleblower later discloses the conduct.

U.K. Bribery Act to Come into Force in April 2011

On July 20, 2010, the MOJ announced that the U.K. Bribery Act will come into force in April 2011 and that guidelines for commercial organizations on antibribery procedures will be published early in the new year.¹ The MOJ also announced that in September of this year it will launch "a short consultation exercise on the guidance about procedures which commercial organisations can put in place to prevent bribery on their behalf...followed by a series of awareness-raising events to ensure everyone is aware of the changes the Bribery Act makes to the current law."

By its own terms, the Bribery Act, which received Royal Assent on April 8, 2010, does not come into force until an order is issued by the Secretary of State. The Bribery Act also obligates the Secretary of State to publish guidance regarding procedures that commercial organizations can put in place to prevent bribery. The forthcoming guidelines will be relevant to a defense that is available to commercial organizations that fail to prevent bribery. To take advantage of this defense, commercial organizations must prove that they had "adequate procedures" in place designed to prevent persons associated with them from bribing.

The Bribery Act creates two general offenses that prohibit the offering, promising or giving of a bribe and the requesting, agreeing to receive or accepting a bribe. In addition, the Bribery Act creates a discrete offense of bribery of a foreign official and a strict liability corporate offense of a failure by a commercial organization to prevent a bribe being paid on its behalf that is subject to the "adequate procedures" defense mentioned above.

This announcement follows the recent appointment of Justice Secretary Kenneth Clarke as the U.K.'s new international anti-corruption champion. According to the MOJ, he will be responsible for "ensur[ing] the effective implementation of the Bribery Act 2010, legislation which will help to achieve the highest in international standards and demonstrates cross-party commitment to the fight against bribery."²

Four-Year Sentence in Haiti Case

On June 1, 2010, Robert Antoine, a former official of Haiti's state-owned national telecommunications company, was sentenced in Miami to four years in prison for his involvement in a money laundering conspiracy in connection with a foreign bribery scheme. U.S. District Court Judge Jose E. Martinez also ordered Antoine to serve three years of supervised release following his prison term, to pay \$1,852,209 in restitution, and to forfeit \$1,580,771. Antoine previously pleaded guilty to conspiracy to commit money laundering on March 12, 2010.³

From May 2001 to April 2003, Antoine, of Miami and Haiti, was the Director of International Affairs for Telecommunications D'Haiti (Haiti Teleco). In this capacity, Antoine was responsible for managing relationships between U.S. telecommunications companies and Haiti Teleco, and previously admitted to accepting bribes from three U.S. telecommunications companies. In order to "disguise the origin" of these bribes, Antoine admitted to laundering them through various intermediary companies, including J.D. Locator Services and Fourcand Enterprises.

Several other individuals were involved in the conspiracy, and have either pleaded guilty or are currently awaiting trial. Trial is currently scheduled to begin December 6, 2010, in the U.S. District Court in Miami.

This case is an example of the DOJ's use of statutes other than the FCPA to charge foreign officials who accept bribes. It also illustrates increasing cooperation between the DOJ and foreign agencies in FCPA cases.

Technip S.A., Snamprogetti Netherlands B.V. and ENI S.p.A. Settle DOJ and SEC Charges Related to a Nigerian Bribery Investigation

Technip S.A. (Technip), Snamprogetti Netherlands B.V. (Snamprogetti), and its former parent ENI S.p.A. (ENI), have settled various FCPA charges with the DOJ and SEC related to their involvement in a decade-long scheme to bribe Nigerian government officials to obtain engineering, procurement, and construction (EPC) contracts. The contracts related to building liquefied natural gas (LNG) facilities on Bonny Island, Nigeria, and were valued at more than \$6 billion.⁴

The scheme involved a four-company joint venture, which included Snamprogetti, Kellogg Brown & Root Inc. (KBR), Technip, and a Japanese engineering and construction company. The joint venture received four EPC contracts from Nigeria LNG Ltd. (NLNG) between 1995 and 2004 to build LNG facilities on Bonny Island. Snamprogetti authorized the hiring of two agents, Jeffrey Tesler and a Japanese trading company, to pay bribes to Nigerian government officials. Approximately \$132 million was paid to a Gibraltar corporation controlled by Tesler, and more than \$50 million to the Japanese trading company. According to court documents, Snamprogetti intended for these payments to be used for bribes to Nigerian government officials.

Court documents alleged that the joint venture partners went so far as to form a "cultural committee," comprised of senior sales executives at each company, to facilitate the scheme.⁵ In

order to conceal the illicit payments, the joint venture entered into sham contracts with a shell company and a Japanese trading company as conduits for the bribes. The joint venture paid these two agents more than \$180 million.

The joint venture has been under investigation since 2004. In 2009, Halliburton and KBR, a former subsidiary of Halliburton, settled various FCPA charges for approximately \$579 million.⁶

On June 28, 2010, Technip entered into a deferred prosecution agreement with the DOJ, agreeing to pay \$240 million to settle FCPA charges related to the scheme.⁷ The DOJ filed the deferred prosecution agreement and criminal information against Technip in the U.S. District Court for the Southern District of Texas. Per the agreement, the DOJ agreed to defer prosecution of Technip for two years. Technip agreed to hire an independent compliance monitor for a two-year period to review its compliance program, and also agreed to cooperate with the DOJ in ongoing investigations.

In a related case, the SEC charged Technip with multiple violations of the FCPA, including books and records and internal controls violations related to the Nigerian bribery scheme. Technip agreed to settle the charges for \$98 million. The SEC complaint alleged that Technip's internal controls failed to uncover or otherwise prevent the bribery, and that Technip's records were falsified as a result of the scheme.

Without admitting or denying the SEC's charges, Technip has agreed to a court order permanently enjoining it from violating the FCPA, to disgorge \$98 million in profits related to the bribery scheme, and to pay any prejudgment interest.

On July 7, 2010, Snamprogetti agreed to pay a \$240 million criminal penalty stemming from FCPA violations related to its involvement in the Nigerian bribery scheme.⁸ The DOJ filed a deferred prosecution agreement against Snamprogetti in the U.S. District Court for the Southern District of Texas. The information charged Snamprogetti with one count of conspiracy and one count of aiding and abetting violations of the FCPA.

Under the deferred prosecution agreement, Snamprogetti, its current parent company, Saipem S.p.A., and its former parent company, ENI, agreed to ensure that their compliance programs satisfied DOJ criteria, and to cooperate with ongoing investigations.

ENI and Snamprogetti settled a related civil action with the SEC on July 7, 2010, which charged Snamprogetti with violating the FCPA's antibribery, books and records, and internal controls provisions, and charged ENI with books and records and internal controls violations. Subject to court approval, Snamprogetti and ENI will jointly and severally pay \$125 million to settle the SEC's charges.⁹

ENI and Snamprogetti are the latest companies to be charged in the Nigerian bribery investigation. As noted above, Technip, KBR, and its former parent, Halliburton, have all settled similar FCPA

charges for a total of approximately \$917 million.¹⁰ Combined with the \$365 million to be paid by Snamprogetti and ENI, sanctions against all the companies total more than \$1.28 billion. Approximately \$400 million of this amount has been disgorged to the SEC, which represents the largest combined disgorgement from FCPA violations to date.¹¹

SEC Files Settlement with Veraz Networks, Inc.

The SEC filed a settled federal court action against Veraz Networks, Inc. (Veraz), a California-based telecommunications company, alleging violations of the FCPA's books and records and internal controls provisions.¹² In 2007 and 2008, Veraz allegedly engaged a consultant in China who provided gifts and offered improper payments, together valued at approximately \$40,000, to officials at a government-controlled telecommunications company in China in order to win business for Veraz. A Veraz supervisor responsible for approving the gifts described them in an internal email as the "gift scheme." In addition, and also in 2007 and 2008, a Veraz employee allegedly made improper payments to the CEO of a government-controlled telecommunications company in Vietnam.¹³

This case represents one of the first filed by the SEC after creating a dedicated FCPA enforcement unit in January 2010. Although based in Washington, D.C., the unit includes lawyers from six of the SEC's regional offices. The case against Veraz was handled by the SEC's San Francisco office, which has stated that it would focus its investigations on companies based in Silicon Valley.¹⁴

The SEC's complaint charged Veraz with violating the FCPA by failing to accurately record the improper payments on its books and records, and failing to devise and maintain an effective internal control system to prevent such payments. Without admitting or denying the SEC's allegations, Veraz agreed to the entry of a court order permanently enjoining Veraz from future FCPA violations and ordering Veraz to pay a penalty of \$300,000.¹⁵

¹ Press Release, Ministry of Justice, The UK will reinforce its reputation as one of the least corrupt countries in the world, when the Bribery Act comes into force in April 2011 (July 20, 2010), www.justice.gov.uk/news/newsrelease200710a.htm.

² Press Release, Ministry of Justice, Justice Secretary, Kenneth Clarke, has today been announced as the United Kingdom's new international anti-corruption champion (June 15, 2010)

www.justice.gov.uk/news/newsrelease150610a.htm.

³ Press Release, Department of Justice, Former Haitian Government Official Sentenced to Prison for His Role in Money Laundering Conspiracy Related to Foreign Bribery Scheme (June 2, 2010), www.justice.gov/opa/pr/2010/June/10-crm-639.html.

⁴ Press Release, Department of Justice, Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty (June 28, 2010), www.justice.gov/opa/pr/2010/June/10-crm-751.html; Press Release, Securities and Exchange Commission, SEC Charges Italian Company and Dutch Subsidiary in Scheme Bribing Nigerian Officials with Carloads of Cash (July 7, 2010), www.sec.gov/news/press/2010/2010-119.htm.

⁵ Litigation Release, Securities and Exchange Commission, No. 21578 (June 28, 2010), www.sec.gov/litigation/litreleases/2010/lr21578.htm.

⁶ Christopher M. Matthews, *Technip to Pay Combined \$338M to Settle FCPA Charges*, MAIN JUSTICE, June 28, 2010, www.mainjustice.com/2010/06/28/technip-to-pay-combined-338m-to-settle-fcpa-charges.

⁷ Press Release, Department of Justice, Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty (June 28, 2010), www.justice.gov/opa/pr/2010/June/10-crm-751.html.

⁸ Press Release, Department of Justice, Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay

\$240 Million Criminal Penalty (July 7, 2010),
www.justice.gov/opa/pr/2010/July/10-crm-780.html.

⁹ Litigation Release, Securities and Exchange Commission, No. 21588 (July 7, 2010), www.sec.gov/litigation/litreleases/2010/lr21588.htm.

¹⁰ Press Release, Securities and Exchange Commission, SEC Charges Italian Company and Dutch Subsidiary in Scheme Bribing Nigerian Officials with Carloads of Cash (July 7, 2010), www.sec.gov/news/press/2010/2010-119.htm.

¹¹ Aruna Viswanatha, Third Settlement in Nigerian Bribery Investigation, MAIN JUSTICE, July 7, 2010, www.mainjustice.com/2010/07/07/third-settlement-in-nigerian-bribery-investigation.

¹² Litigation Release, Securities and Exchange Commission, No. 21581 (June 29, 2010), www.sec.gov/litigation/litreleases/2010/lr21581.htm.

¹³ Press Release, Securities and Exchange Commission, SEC Charges California Telecommunications Company with FCPA Violations (June 29, 2010), www.sec.gov/news/press/2010/2010-115.htm.

¹⁴ Aruna Viswanatha, *SEC Fines Telecom Firm \$300,000 for Violating FCPA*, MAIN JUSTICE, June 29, 2010, www.mainjustice.com/2010/06/29/sec-fines-telecom-firm-300000-for-violating-fcpa.

¹⁵ Press Release, Securities and Exchange Commission, SEC Charges California Telecommunications Company with FCPA Violations (June 29, 2010), www.sec.gov/news/press/2010/2010-115.htm.

Authors



Roger M. Witten

SENIOR COUNSEL

✉ roger.witten@wilmerhale.com

☎ +1 212 230 8800



Kimberly A. Parker

PARTNER

Vice Chair,
Litigation/Controversy
Department

Co-Chair, White Collar Defense
and Investigations Practice

✉ kimberly.parker@wilmerhale.com

☎ +1 202 663 6987



Jay Holtmeier

PARTNER

✉ jay.holtmeier@wilmerhale.com

☎ +1 212 295 6413