

ANTITRUST & TRADE PRACTICES

Alert

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

SEC Launches Specialized FCPA Enforcement Unit; FCPA “Crackdown” Against Individuals and Public & Private Companies Continues

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Key Points

- The SEC has created a new unit dedicated to enforcing the U.S. Foreign Corrupt Practices Act. Expect SEC FCPA enforcement actions to continue to increase.
- The FCPA “crackdown” by the SEC and DOJ continues. Enforcers are also upholding their pledge to more aggressively pursue individuals for their involvement in FCPA violations.
- Effective foreign anti-corruption compliance is essential for companies and employees that do business internationally. Learn what you can do to reduce FCPA risk.

SEC Creates New FCPA Enforcement Unit

The U.S. Securities and Exchange Commission (SEC) has created a new unit to focus on increased enforcement of the U.S. Foreign Corrupt Practices Act (FCPA). In remarks this month, Robert Khuzami, the SEC’s Director of Enforcement, identified the FCPA unit as one of five new enforcement units dedicated to “particular highly specialized and complex areas of securities law.” Director Khuzami emphasized the importance of focusing on cases that “send an outsized message of deterrence,” stating:

The Foreign Corrupt Practices Act unit will focus on new and proactive approaches to identifying violations of the Foreign Corrupt Practice[s] Act ... While we have been active in this area, more needs to be done, including being more proactive in investigations, working more closely with our foreign counterparts, and taking a more global approach to these violations.¹

¹ Speech by Robert Khuzami, Director, SEC Division of Enforcement, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009), *available at* <http://www.sec.gov/news/speech/2009/spch080509rk.htm>.

FCPA “Crackdown” Continues

Since December of last year, the SEC and the U.S. Department of Justice (DOJ) have filed numerous FCPA enforcement actions and have collectively assessed more than \$1.3 billion in financial consequences to settle FCPA charges. The *Wall Street Journal*, in a front-page, above-the-fold story published in May reported, “[t]he crackdown under the FCPA ... now extends across five continents and penetrates entire industries ...”² The *Journal* reported that since January 2009, there has been a 20% increase in DOJ investigations under the FCPA. Further, the pace of FCPA enforcement activity has remained high throughout the summer, with multiple individuals and public and private companies facing FCPA enforcement actions, including:

- Control Components, Inc. (CCI), a valve-maker, pleaded guilty to charges that it violated the FCPA by making corrupt payments to employees of state-owned entities in multiple countries to obtain or retain business. As part of its plea agreement, CCI will pay a criminal fine of \$18.2 million and retain a compliance monitor for three years. CCI’s plea comes after the DOJ charged six former members of its management team, including its former CEO and multiple sales executives, with related FCPA charges. Two other former executives have already pleaded guilty to FCPA violations and await sentencing.³
- Frederic A. Bourke, Jr., investor and co-founder of Dooney & Bourke handbags, was convicted by a jury for conspiring to violate the FCPA in connection with investments he made in Azerbaijan allegedly to acquire the State Oil Company at a very competitive price. Prosecutors successfully contended that Bourke knew or should have known that some of the funds he invested were to be used to gain an improper business advantage. Mr. Bourke faces up to five years in prison, as well as a significant fine, at his upcoming sentencing hearing.⁴
- Gerald and Patricia Green, husband and wife film producers, are scheduled to be tried this month for multiple charges stemming from alleged bribes paid to obtain lucrative contracts to run an annual film festival in Thailand.⁵ The Greens each face up to five years in prison per FCPA violation.

These actions illustrate that companies and employees that do business internationally, regardless of the industry, should expect the risk of foreign corruption-related civil and criminal liability to continue to increase.

What’s Next?

Many executives and in-house counsel have re-examined the requirements of this often ambiguous and misunderstood statute to make sure their companies are in compliance. In the course of working

² Dionne Searcey, *U.S. Cracks Down on Corporate Bribes*, WALL ST. J., May 26, 2009, at A1.

³ See DOJ Press Release, *Control Components Inc. Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$18.2 Million Criminal Fine*, No. 09-754 (July 31, 2009), available at <http://www.usdoj.gov/opa/pr/2009/July/09-crm-754.html>.

⁴ See DOJ Press Release, *Connecticut Investor Found Guilty In Scheme to Bribe Government Officials in Azerbaijan*, No. 09-210 (July 10, 2009) available at <http://www.usdoj.gov/usao/nys/pressreleases/July09/bourkefrederickverdictpr.pdf>.

⁵ *United States v. Gerald Green and Patricia Green*, No. 08-CR-00059 (C.D. Cal.).

with our public and private company clients regarding the FCPA, a number of questions are frequently asked. Reviewing the samples below may begin to help a company recognize if FCPA problems are lurking.

- 1. Q: Our company has very little revenue from international business (or our only international dealings involve sourcing products or materials). Does the FCPA have any application to our business?**

A: Yes. Federal enforcers have made it clear that if FCPA violations are occurring, the quantity of international business is irrelevant. Likewise, small, private companies are not immune from FCPA enforcement and can face severe penalties.⁶

- 2. Q: I've heard a lot about the FCPA's "books & records" and "internal controls" requirements but our company already complies with SOX. Isn't that enough?**

A: Not necessarily. Unlike the Sarbanes-Oxley Act, the FCPA doesn't have a materiality standard.⁷ Even small payments, if recorded inaccurately or with insufficient qualitative detail, can land a public company in hot water. As a result, it is important to fully understand the specific requirements of the FCPA.

- 3. Q: We're dealing with a foreign entity (e.g., hospital, manufacturer, transport company, bank, etc.) that's partially state-owned. Does the FCPA impose restrictions on our dealings with the entity's employees?**

A: It depends. The definition of "foreign official" under the FCPA includes employees of foreign instrumentalities.⁸ Government enforcers tend to construe this term broadly. Where a foreign government owns a significant stake in a business or exerts significant control over the business's operations, that business is likely to be considered a foreign instrumentality, and its employees are likely to be considered "foreign officials" under the FCPA. For example, doctors in a state-run hospital may be considered "foreign officials" under the FCPA.⁹

- 4. Q: Our company has a minority stake in a foreign subsidiary or joint venture. Do we have any obligations under the FCPA with respect to the JV or subsidiary?**

A: Expect enforcers to say, "Yes." For example, issuers have an obligation to "proceed in good faith" to encourage minority-owned foreign affiliates to devise and

⁶ See, e.g., DOJ Press Release, *AGA Medical Corporation Agrees to Pay \$2 Million Penalty and Enter Deferred Prosecution Agreement for FCPA Violations*, No. 08-491 (June 3, 2008), available at <http://justice.gov/opa/pr/2008/June/08-crm-491.html> (involving payments made to doctors at a state-run hospital in China by a company with only \$147 million in revenues total).

⁷ See Foreign Corrupt Practices Act of 1977, Statement of Policy, SEC Release No. 34-17500 (Jan. 29, 1981) (codified at 46 FR 11544), 1981 WL 36385, at *9 (Remarks of Harold M. Williams) (noting, "Reasonableness, rather than materiality, is the appropriate test" for the accounting rules under the FCPA).

⁸ 15 U.S.C. § 78dd-1(f)(1)(A).

⁹ See *supra* note 6.

maintain a system of internal accounting controls consistent with the requirements of the FCPA.¹⁰

For an overview of the FCPA, its requirements, and important risk-mitigation measures, Bass, Berry & Sims PLC recommends the following articles:

- *FCPA Compliance Now Essential for All Companies that Do Business Internationally*, CORPORATE COUNSELOR (June 2009), available at <http://www.bassberry.com/files/upload/CorporateCounselJune2009.pdf>.
- *Is that a Crime? Understanding Risks and Obligations in the Foreign Corrupt Practices Act*, TENNESSEE BAR JOURNAL (April 2009), available at http://www.bassberry.com/files/upload/FCPA_article_April09_TBJ.pdf

If you have any questions regarding the issues addressed in this Alert or regarding FCPA/foreign anti-corruption compliance, please feel free to contact Ross Booher, Wally Dietz, Taylor Phillips, any of your regular contacts at Bass, Berry & Sims PLC, or any of the attorneys in the Antitrust and Trade Practices Group listed below.

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