

FCPA — 2007 Enforcement Trends

Introduction

In 2007, the Foreign Corrupt Practices Act (FCPA) celebrated its 30th anniversary, and the federal agencies that enforce the statute observed the milestone with a record number of enforcement actions. This brief year-in-review note discusses the overall trend in enforcement activities, focusing on the increasing reliance of the SEC and the Department of Justice on voluntary disclosures and other external sources of FCPA cases, and the changing and expanding nature of prosecutorial theories employed by both agencies.

Enforcement Activity

In the past year, both the SEC and the DOJ launched a record number of investigations, and a broadening range of companies and individuals have been subjected to ever-greater civil and criminal penalties. This rise in activity continues a six-year trend that has seen the number of new enforcement actions rise at least five-fold. DOJ and SEC officials suggest that at least one hundred investigations are now in progress. Dispositions have grown apace: for example, during the seventeen years since 1990, there have been 78 SEC dispositions of FCPA cases; nearly 20 percent of them took place in 2007.

A few enforcement themes emerged in 2007:

First, the size of FCPA penalties and fines levied grew dramatically. In February 2007, the DOJ imposed a \$26 million criminal fine on three subsidiaries of Vetco International, Inc., then the largest criminal penalty the DOJ had ever sought in an FCPA action. Two months later, subsidiaries of Baker Hughes, Inc. were levied a combined penalty/fine of \$44 million. For SEC actions the sizes of some fines have been magnified by the addition of mandated disgorgement of ill-gained profits, a penalty first assessed in 2004, and now a common component of dispositions. In addition to financial penalties, there is also a clear trend toward requiring offending firms to retain outside compliance consultants. Half a dozen cases that concluded in 2007 included such a provision, often mandating the consultant for a period of three years.

Second, both the SEC and DOJ have stepped up their pursuit of company executives and employees who are viewed as most responsible for a company's FCPA violation. Leading examples of such actions are the SEC's settlements of charges against Charles Martin, a former Government Affairs Director for the Monsanto Company, and against Si Chan Wooh and Robert Philip, both former executives of Schnitzer Steel. In all three cases, the individual action came after the individual's former employer had settled FCPA charges. In other 2007 cases, such as those brought against Willbros International's Jason Steph, and ITXC's Steven Ott and Roger Michael Young, individual prosecutions have been brought without first charging the company.

Third, although the FCPA has always applied to issuers that are neither incorporated nor headquartered in the United States, the past year has seen new efforts to enforce the law against foreign issuers, even if the activities in question occurred outside the United States; indeed the DOJ has stated that focusing on foreign issuers has become an explicit strategy. The first major

proceeding in this regard was against Norway's Statoil ASA in late 2006, which concluded with the company settling charges for a fine of \$10.5 million and disgorging another \$10.5 million in profits. Continuing the trend, in June 2007, a former Alcatel executive, Christian Sapsizian, pled guilty to two counts of violating the FCPA. Sapsizian is a French citizen who worked for a French firm and was charged with paying bribes in Costa Rica; the only connection to the United States was the fact that Alcatel stock was listed on an American exchange. By the end of 2007, high-profile FCPA investigations were underway with respect to several foreign corporations including Siemens, BAE, and Panalpina.

Sources of Cases

2007 saw the establishment of a new, five-member Federal Bureau of Investigation (FBI) team devoted to FCPA investigations. Despite this, and the fact that both the SEC and DOJ have followed the Bureau's lead and increased their own FCPA enforcement resources, 2007 was a year in which an even larger proportion of FCPA cases did not arise from any investigative activity by federal authorities. The bulk of current and recent FCPA cases have arisen from three sources, one of which is ephemeral, the other two of which are mutually reinforcing and will likely only grow as the dual fonts of most FCPA cases.

The short-lived source of FCPA cases derives from the continued fall out from the Independent Inquiry Committee tasked to investigate corruption in the United Nations' Oil-for-Food Program. The Program was designed to allow sanctions-laden, Saddam-era Iraq to sell oil in exchange for humanitarian goods. The Committee, chaired by former Federal Reserve Board Chairman Paul Volcker, published its *Report on the Manipulation of the Oil-for-Food Program* in October 2005, which described extensive fraud within the Program and implicated a host of companies and individuals in activities that — at least in the view of the SEC and DOJ — violated the FCPA. The Volcker Report has been a rich source for FCPA investigations: Oil-for-Food cases accounted for over 20 percent of all the FCPA dispositions reached in 2007.

The most important of the likely permanent external sources of FCPA cases is voluntary disclosures by companies to the enforcement authorities of activities on their part that violate the FCPA. These disclosures are voluntary in the sense that they are not legally required and are made without any prompting from the authorities. This movement toward voluntary disclosure and away from government-initiated cases has been remarkable. Of those FCPA investigations that were publicly disclosed in 2003 through 2005, the government initiated 57 percent. Of the 55 disclosed FCPA investigations in 2006-2007, only 36 percent were initiated by the government, with 64 percent the result of voluntary disclosures. Together, voluntary disclosures and Oil-for-Food cases accounted for 75 percent of all disclosed cases in 2006 and 2007 (allowing for the fact that some cases fell into both categories).

The second long-term source of FCPA cases comes from the growing global acceptance of anti-corruption measures. Some states have become relatively serious about enforcing their long-standing laws against corruption of their own officials, and some even have begun to enforce their recently enacted counterparts to the FCPA. These new enforcement efforts by foreign authorities have become a ready source of US FCPA enforcement actions. Via formal information sharing and partnership or informal scouring of foreign media, the work of foreign governments has begun to feed directly into DOJ and SEC enforcement decisions. For instance, *Statoil* was pursued after the Norwegian press reported on the matter and US authorities learned that Oslo was choosing not to pursue criminal charges against the firm. The British firm BAE is now under investigation in this country following the publicly disclosed decision of British authorities not to pursue allegations of corruption in the company's dealing with Saudi Arabia.

Conclusion — Looking Ahead

Assistant Attorney General Alice Fisher noted at the end of 2007 that her FCPA workload was already double that of 2006 and expected 2008 to continue the expansion. As more Oil-for-Food cases emerge, and trends towards voluntary disclosures and foreign sourcing of cases continue, 2008 promises to be a even busier year for FCPA enforcement.

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