November 6, 2014
2:20 pm-3:30pm

Damned If You Do And Don't: When Compliance with the FCPA Means Risking Violating Foreign Law

Best practices in FCPA compliance often have been discussed without regard to whether such practices might violate the local laws of the relevant country in which you are doing business outside the U.S. For example, local laws can make it unlawful to investigate, discipline or terminate employees suspected or found to have paid bribes. In some countries, local laws sometimes even require immediate reporting of suspected acts of corruption. This panel will analyze the risks of local prosecution faced by in-house attorneys of entities that do business internationally and the external counsel that advise them, as well as government regulators seeking global context for their US-centric investigations. Particular attention will be paid to the convergence and divergence between US law and the local laws of China, India and Russia.

Panelists:
Betty L. Hum, *Associate Director*, Anti-Corruption Compliance, Intel Corp.
Natasha Price, *Vice President & Deputy Compliance Officer*, Avnet, Inc.
Ronald L. Cheng, *Assistant U.S. Attorney,* U.S. Attorney's Office for the Central District of California

2014 NAPABA International Symposium

"Damned If You Do And Don't: When Compliance with the FCPA Means Risking Violating Foreign Law"

Timed Agenda

1. Introduction of panelists and background of topic (5 minutes)

2. Panel to discuss local laws in China that could impede FCPA compliance and investigations for multinationals operating there (20 minutes)

3. Panel to discuss local laws in India that could impede FCPA compliance and investigations for multinationals operating there (20 minutes)

4. Panel to discuss local laws in Russia that could impede FCPA compliance and investigations for multinationals operating there (20 minutes)

6. Q&A with Panelists (10 minutes)

THE RECORDER

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From antitrust to FCPA liability

Investigations of anti-competitive conduct can unearth corrupt practices, leading to even greater exposure for companies

Rachel S. Brass, Winston Y. Chan and Joshua S. Lipshutz

White-Collar Crime

In December 1999, Gary R. Spratling, then deputy assistant attorney general of the Antitrust Division of the U.S. Department of Justice (now a Gibson, Dunn & Crutcher partner), presented at the American Conference Institute's Seventh National Conference on the Foreign Corrupt Practices Act. See www.justice.gov/atr/public/speeches/3981.htm. His speech began by rhetorically asking "why a career antitrust prosecutor is addressing a conference on the FCPA?" He then set forth what amounted to an early warning shot on potentially overlapping enforcement.

Twelve years later, the FCPA is a hotspot of enforcement activity by the DOJ and U.S. Securities and Exchange Commission. In 2010, for example, the DOJ brought 36 actions against individuals and another 21 against corporations, nearly five times the 2006 total. In 2010, FCPA fines and penalties reached nearly $1.8 billion, with five separate FCPA settlements topping $100 million. Incarceration rates and prison terms for FCPA violations have also skyrocketed: In the past two years alone, eight individuals received sentences of a year or longer, and as high as seven years.

Internationally, anti-corruption enforcement is experiencing a similar though nascent boom. In 2011, for example, the U.K.'s new and comprehensive anti-bribery law went into effect and China criminalized bribes paid to foreign government officials and international public organizations. And a host of countries enforce commercial bribery laws prohibiting improper payments that adversely impact competition even in purely private transactions.

Against this background, the once occasional linkage between anti-corruption and antitrust enforcers has developed into full-scale and public partnership. And plaintiff attorneys are beginning to capitalize on the overlap, invoking state antitrust laws to seek damages in the wake of FCPA investigations. Representing clients in this paradigm requires a keen awareness of both anti-corruption and antitrust exposure.

The FCPA's anti-bribery provisions bar offering or providing money or any "thing of value" to "foreign officials," "any candidate for foreign political office" or "any foreign political party or official thereof" with the intent to obtain business. Regrettably, there is no *de minimis* exception: gifts, entertainment, travel assistance, educational activities or the offering of loans or jobs may all trigger an investigation of a corporation's hospitality and marketing practices.

The anti-bribery provisions apply to "issuers," "domestic concerns" and "any person" who has taken an act in furtherance of a corrupt payment while in the United States. The term "issuer" covers business entities registered under 15 U.S.C. §78l or required to file reports under 15 U.S.C. §780(d), including approximately 1,500 foreign issuers with American Depository Receipts traded on U.S. exchanges. The term "domestic concern" is even broader and includes any U.S. citizen, national or resident, as well as any business entity that is organized or that has a principal place of business in the United States.

The DOJ and SEC reserve their most expansive interpretation for the term "foreign official," which includes officers or employees (1) of a foreign government, including its departments, agencies or instrumentalities; and (2) of public international organizations, such as the United Nations and World Bank. The far-reaching consequences are not intuitive. For example, under the government's expansive interpretation, a doctor operating under a nationalized health care system, a reporter for a government press agency or an executive at a state-controlled airline might qualify as a "foreign official."

In addition to enforcement actions under the anti-bribery provisions, prosecutors frequently invoke the FCPA's "accounting provisions." The first, "books-and-records," requires issuers to make and keep books, records and accounts, which accurately and fairly reflect the issuer's transactions and disposition of assets. The second, "internal controls," requires that issuers devise and maintain reasonable internal accounting controls to prevent and detect FCPA violations. Because there is no requisite link between a false record or deficient control and an improper payment, even an expenditure that does not violate the anti-bribery provisions can lead to an investigation into the

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accuracy of the accounting entries. Unlike the federal antitrust laws, the FCPA contains no private right of action (although a bill providing one has been introduced in Congress). No state law corollaries expressly provide such a cause of action. But private plaintiffs have launched collateral civil suits based on the facts unearthed during FCPA investigations, including shareholder derivative, securities fraud, tortious interference, unfair competition and disgruntled competitor claims. The announcement of FCPA pleas or settlements raises the threat of collateral antitrust treble damage actions that regularly follow Sherman Act enforcement.

THE BRIDGESTONE JOINT PLEA

In September 2011, Bridgestone Corp. became publicly emblematic of the modern joint-enforcement era when it simultaneously pleaded guilty to a two-count Information charging it with conspiring to violate both the Sherman Act and the FCPA. The investigation began with a DOJ inquiry into whether the Tokyo-based company had engaged in bid-rigging, price-fixing or market allocation relating to the sale of marine hose. In the course of that investigation, the Antitrust Division discovered likely FCPA violations involving Bridgestone's contracts with local sales agents throughout Latin America, which it referred to the DOJ's Criminal Division. The ensuing FCPA investigation revealed that local sales agents had made corrupt payments to employees of state-owned business to secure sales — with Bridgestone's approval.

Despite what the DOJ characterized as "extraordinary" cooperation, Bridgestone was required to plead guilty and pay a $28 million fine for violating both the Sherman Act and the FCPA. The Tokyo-based Bridgestone executive who managed the department purportedly responsible for overseeing the FCPA-related conduct — a Japanese citizen — pleaded guilty to two felony counts and was sentenced to two years in jail and an $80,000 fine. Had the government brought only antitrust charges, it is likely Bridgestone and the executive would have escaped with less severe criminal penalties; application of the sentencing guidelines to the conduct described in the company's plea agreement suggests that 80 percent of its fine was attributable to the FCPA conduct.

INNOSPEC AND COLLATERAL CONSEQUENCES

Specialty chemical maker Innospec Inc. also confronted a one-two punch, albeit from different sources. In March 2010, the company agreed to plead guilty to a 12-count indictment for corrupt payments to Iraqi Ministry of Oil officials under the U.N. Oil-For-Food Program, paying a $14.1 million fine to the DOJ for violations of the FCPA's anti-bribery provisions and disgorging $11.2 million in profits to the SEC for violations of the FCPA's accounting provisions, as well as $12.7 million to the Serious Fraud Office for conspiracy to corrupt. With the investigations resolved, the company was then hit with a piggyback lawsuit from one of its competitors, NewMarket, alleging violations of the Robinson-Patman Act, Virginia Antitrust Act and Virginia Business Conspiracy Act. NewMarket alleged that the FCPA conduct constituted unfair competition, purportedly because the bribes and kickbacks resulted in unfair advantage. Those claims were settled for an additional $45 million.

Companies and individuals facing investigation for possible price fixing, bid rigging, agreements to allocate customers, or other conduct that may violate competition laws may very well be subject to simultaneous investigation into FCPA or other anti-corruption violations, whether they realize it or not.

INTERNATIONAL COMMERCIAL BRIBERY ENFORCEMENT

Where an improper payment is alleged to impact a decision to award transactions, allocate product or markets, or otherwise promote business, it may violate both competition and anti-corruption laws in countries with developed commercial bribery regimes. Companies increasingly face unfair competition actions for business practices once considered customary, including payment of rebates or product placement fees, sponsorship of customer conferences, or provision of business hospitality. Take China, for example. In 2010, Toyota Motor Finance (China) Co. was fined $22,000 for offering rebates to encourage three automobile dealers to steer customers toward the unit and away from local banks. Or Korea, where pharmaceutical executives were convicted on criminal bribery charges for paying doctors to conduct clinical trials, following a parallel Korea Fair Trade Commission investigation. In these and other countries where bribery and competition laws have converged, even purely private transactions can be a source of joint enforcement risk.

KEY TAKEAWAYS

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This concomitant risk is particularly high in the context of public tenders, where a company's aggressive drive for market share might involve offering bribes to government officials or customers, or engaging in bid rigging to win the tender. In addition, a company's purported attempt to gain unfair advantages through backroom discussions might well involve providing a payment or other "thing of value" to either a competitor with government ties, or a customer that is a state-owned enterprise. Even a payment to address cheating on a customer allocation agreement, if made to such a state-owned enterprise, might trigger FCPA liability.

Antitrust attorneys are therefore on notice to keep a watchful eye: To the extent their clients are being scrutinized for their competitor contacts overseas, those very contacts could be a hidden source of liability under the FCPA and other countries' anti-corruption laws. FCPA attorneys should be similarly watchful of antitrust concerns, as audits provide an early opportunity to ferret out potentially unlawful conduct.