



BEIJING BRUSSELS CHICAGO DALLAS FRANKFURT GENEVA HONG KONG LONDON LOS ANGELES NEW YORK SAN FRANCISCO SHANGHAI SINGAPORE SYDNEY TOKYO WASHINGTON, D.C.



Foreign Corrupt Practices Act: Use of Third Parties

Presentation to: Pharmaceutical Regulatory and Compliance Congress
and Best Practices Forum

May 28, 2009

Paul V. Gerlach
Sidley Austin LLP
Washington, DC



www.dilbert.com scottadams@aol.com



9-3-08 © 2008 Scott Adams, Inc./Dist by UFS, Inc.



FCPA: Indirect Offers/Payments Prohibited

- Payment or offers/promises to pay any person while knowing all or portion of value will be given, directly or indirectly, to any foreign official are prohibited.
- “Knowing” means:
 - Actual awareness
 - A firm belief as to the existence of such circumstance or that such circumstance will occur
 - A high probability of the existence of circumstance unless the person “actually believes that such circumstance does not exist”
 - No “willful blindness” - *i.e.*, conscious disregard or deliberate ignorance of known circumstances that should alert one to FCPA violations is not permitted

Third-Party Agents

- Companies can be held responsible for the improper conduct of their agents and consultants
- Payments by agents/consultants actionable if U.S. entity or issuer:
 - Authorizes the payment;
 - Knows payment would be made; or
 - Tacitly approves payment.
- Low Threshold for Liability: Actual knowledge, “substantially certain,” or “aware of a high probability” of illicit payment equally actionable.

Agents Themselves Can Be Liable

- *ABB Vetco Gray*: Foreign affiliates of U.S. company prosecuted for actions taken abroad in conjunction with U.S. entity
- *DPC*: Foreign subsidiary of U.S. company prosecuted as “agent” of U.S. “issuer”
- *Kozeny*: Foreign national who is chairman of foreign company with U.S. shareholders prosecuted as agent of “domestic concerns”

Types of Third-Parties

- Sales agents
- Distributors
- Consultants / Lobbyists
- Sub-contractors
- Subsidiaries
- Others
 - Freight forwarders / customs agents – see *ABB Vetco*
 - Attorneys (*e.g.*, for license applications)

Joint Ventures and Partnerships

- Vicarious liability for illicit payments by a joint venture partner if the partner deemed an “agent” of the U.S. issuer.
- Payments by joint ventures or partners actionable if U.S. issuer:
 - Authorizes the payment;
 - Knows payment would be made; or
 - Tacitly approves payment.
- Be particularly careful with locally-owned joint venture partners.

Protecting Against Third-Party Liability

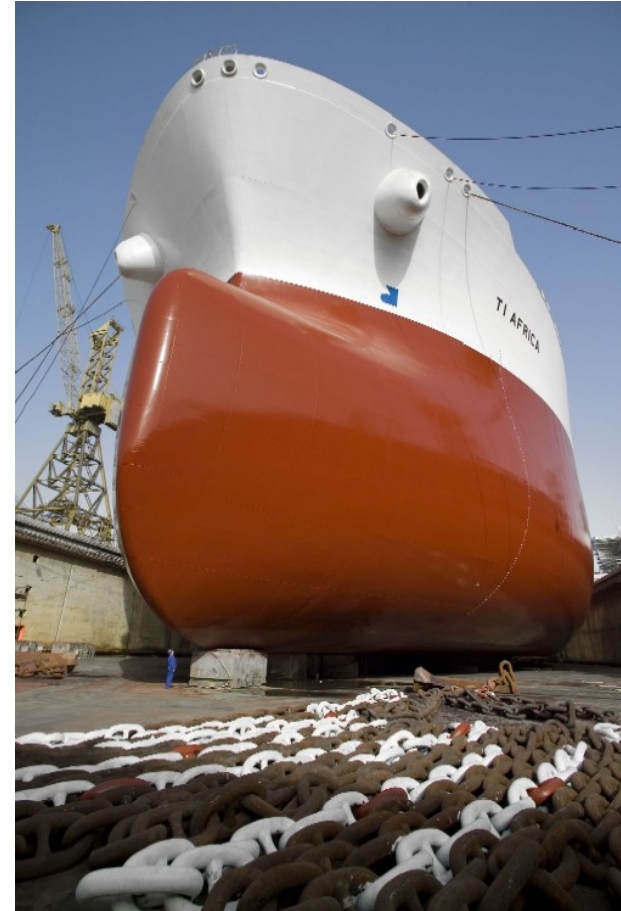
- It is essential to:
 - conduct appropriate diligence when selecting agents, consultants, and other third parties;
 - ensure that third parties receive FCPA compliance training; and
 - employ procedures to monitor the conduct of third parties for compliance with the FCPA.
- Contracts with third parties should expressly address FCPA compliance.
- Risk factors
 - Nature and duration of intended relationship
 - Compensation arrangement
 - Experience and reputation
 - Geographic location
 - Interaction with government officials
- Bottom line: **know your partners.**

Red Flags

- Requests for payments to off-shore entities or accounts
- Abnormal or unexplained commission requests
- Requests for cash payments or use of bearer instruments
- Refusal to provide FCPA certifications
- Incomplete response to due diligence questionnaires
- Lack of requisite qualifications or operations to satisfy duties and responsibilities
- Close relationship between third party and government official or entity

United States v. Vetco Gray Controls Inc., Vetco Gray Controls Ltd., Vetco Gray UK Ltd., and Aibel Group Ltd. (S.D. Tex. 2007)

- **Background:** Vetco Gray subsidiaries are in the business of providing upstream oil and gas products and services in Nigeria.
- From at least September 2002 to at least April 2005, the Vetco International Subsidiaries made at least 378 payments totaling approximately \$2.1 million through a major international freight forwarding and customs clearance company to Nigerian customs officials.
- Purpose of the payments was to secure preferential treatment from the customs service during the customs process.



United States v. Vetco Gray Controls Inc., Vetco Gray Controls Ltd., Vetco Gray UK Ltd., and Aibel Group Ltd. (S.D. Tex. 2007)

The Result:

- Vetco Gray subsidiaries pleaded guilty to violations of the anti-bribery provisions of the FCPA and agreed to a collective fine of \$26 million.
- They also agreed to hire an independent monitor to oversee the implementation of a robust compliance program, to undertake an investigation of the company's operations, and to agree that any potential buyer of the company would be bound to those monitoring and investigation conditions.
- Vetco Gray Controls Inc. and Vetco Gray UK Ltd. had previously pleaded guilty under the FCPA in 2004 in connection with their sale by ABB and the DOJ had required the implementation of compliance measures at that time. The previous guilty pleas and the failure of such compliance measures, evidenced by the continuation of corrupt activity, were taken into account by the DOJ in assessing the fines.

U.S. v. Baker Hughes Incorporated, et al.
SEC v. Baker Hughes Incorporated, et al.
(S.D. Tex. 2007)

- **Background:** Baker Hughes Inc. (BHI) and its wholly-owned subsidiary, Baker Hughes Services International, Inc. (BHSI), submitted a bid in 2000 to the Kazakhstan government-owned oil company, Kazakhoil, for work on an oil-field drilling project.
- In September 2000, a Kazakhoil official demanded that Baker Hughes, in order to win the contract, pay Consulting Firm A, located in the Isle of Man, a “commission” equal to 3.0% of the revenue earned by Baker Hughes on the project.
- In October 2000, Baker Hughes was notified that its bid was successful.
- Between May 2001 and November 2003, Baker Hughes, through an employee of BHSI, made 27 commission payments to Consulting Firm A, totaling \$4.1 million, most or all of which was transferred to officials of Kazakhoil.



- During the period October 2000 through November 2003, Baker Hughes realized profits of approximately \$19.9 million.

U.S. v. Baker Hughes Incorporated, et al.
SEC v. Baker Hughes Incorporated, et al.
(S.D. Tex. 2007)

The Result:

- On April 26, 2007, BHI and BHSI each pled guilty to criminal violations of the FCPA's Anti-Bribery and Books and Records provisions. BHSI agreed to pay a fine of \$11 million; BHI agreed to be subject to a deferred prosecution agreement.
- On the same day, BHI settled a civil enforcement action by the SEC for violation of the FCPA. BHI agreed to pay more than \$23 million in disgorgement and prejudgment interest and to pay a civil penalty of \$10 million for violating a 2001 SEC cease-and-desist order prohibiting violations of the Books and Records provisions of the FCPA.
- BHI also agreed to retain an FCPA Compliance Consultant, at its own expense, to review and evaluate its internal policies and procedures and how they are actually implemented; BHI must adopt all recommendations of the Consultant, unless BHI can demonstrate that they are unduly burdensome or costly.

U.S. v. The Titan Corporation (S.D. Cal., March 2005)

SEC v. The Titan Corporation (D.D.C., March 2005)

- **Background:** Titan Corp. and its subsidiaries were parties to agreements with the government of Benin, Africa to modernize the telecommunications infrastructure of Benin.
- From 1999 to 2001, Titan paid more than \$3.5 million to its agent in Benin, who was known at the time by Titan to be the business advisor to the President of Benin.

- At the direction of at least one senior Titan officer based in the United States, Titan funneled approximately \$2 million, via its agent in Benin, to the re-election campaign of Benin's then-incumbent President.
- The senior Titan officer directed that these payments be falsely invoiced by the agent as consulting services and that actual payment of the money be broken into smaller increments and spread out over time.



- Despite using over 120 agents and consultants in over 60 countries, Titan never had a formal company-wide FCPA policy, disregarded or circumvented the limited FCPA policies and procedures in place, and failed to maintain sufficient due diligence files on its foreign agents.

U.S. v. The Titan Corporation (S.D. Cal., March 2005)
SEC v. The Titan Corporation (D.D.C., March 2005)

➤ Titan also:

- Falsified documents that enabled Titan's agents to under-report local commission payments in Nepal, Bangladesh and Sri Lanka.
- Falsified documents presented to the U.S. government by under-reporting commission payments on equipment exported to Sri Lanka, France and Japan.
- Paid a World Bank analyst in cash to assist it in its project in Benin.
- Paid a Benin government official approximately \$14,000 in travel expenses from 1999 to 2001.
- Purchased and gave a \$1,850 pair of earrings to the wife of the President of Benin.

U.S. v. The Titan Corporation (S.D. Cal., March 2005)
SEC v. The Titan Corporation (D.D.C., March 2005)

The Result:

- Civil fine of \$15.5 million for disgorgement and prejudgment interest.
- Criminal fine of \$13 million.
- Retention of an independent consultant to review the company's FCPA compliance procedures and agreement by Titan to adopt and implement the consultant's recommendations.
- Collapse of Lockheed Martin's proposed \$1.6 billion acquisition of Titan.



Questions?

Paul V. Gerlach

1-202-736-8582

pgerlach@sidley.com

Sidley Austin LLP

1501 K Street, NW

Washington, DC 20005