

SIDLEY AUSTIN LLP

SIDLEY

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



FCPA, ANTIBRIBERY AND ANTICORRUPTION IN ASIA AND MIDDLE EAST: Developments in Foreign Corrupt Practices Act Enforcement

Fourth International Pharmaceutical Regulatory and Compliance Congress
Berlin, Germany | May 17, 2010

Joseph B. Tompkins, Jr.
Partner, Washington D.C.

Introduction

"[O]ne area of criminal enforcement that will be a focus for the Criminal Division in the months and years ahead [is] the **application of the Foreign Corrupt Practices Act** (or 'FCPA') to the **pharmaceutical industry.**"

"[T]he Department of Justice will be vigilant in **holding companies and individuals who break the law accountable**, not only through **civil actions** . . . but also by bringing **criminal indictments** if the facts and the law warrant."

*Lanny A. Breuer
Assistant Attorney General
Criminal Division, U.S. DOJ
November 12, 2009*

Agenda

- I. Overview of the FCPA
 - A. Basic Elements
 - B. Exceptions & Affirmative Defenses
 - C. Accounting Provisions
- II. Jurisdictional Reach
- III. Other Anti-Corruption Initiatives
- IV. Enforcement Climate
- V. M&A Due Diligence
- VI. Appendix: Actual FCPA Prosecutions

I. Overview of the FCPA

- Historical Perspective (1970s)
 - Over 400 U.S. Companies admitted making questionable or illegal payments
 - Payments totaled in excess of \$300 million
 - FCPA adopted in 1977
- OECD Convention (Adopted 1997)
 - Modeled after FCPA
 - Adopted by 36 countries, including most economic powers (*e.g.*, U.S., France, U.K., Germany, Spain, Canada, Italy, Belgium)
 - Adoption not as widespread in Asia (only Japan and Korea). China is not a signatory
- Basic Components
 - Antibribery Provisions
 - Accounting Provisions:
 - (1) Books and Records
 - (2) Internal Controls

I. Overview of the FCPA

Elements of an FCPA Violation

- A “covered” person / entity
- Must offer or give something of “value”
- To a “foreign official”
- To “obtain or retain business”
- With “corrupt” intent

I. Overview of the FCPA

Who is a “Covered” Person?

- **Issuers** of registered securities in the U.S. (includes non-U.S. companies who trade ADRs on U.S. stock exchanges)
- All “**domestic concerns**” meaning U.S. citizens, residents, companies, and foreign branches of U.S. companies
- Officers, directors, employees, and agents of the above
- **Foreign companies or persons** who commit acts in furtherance of corrupt payments while in the U.S. or who cause others to do so

I. Overview of the FCPA

What is “Value”?

- “Anything of value” broadly construed
 - Cash and cash equivalent
 - Extravagant hosted travel and non-monetary gifts
 - Intangible benefits such as enhanced reputational value for the official or benefit conferred to favored cause or charity
 - Benefit to third persons with connection to government officials
- Includes offer or promise alone
- No *de minimis* exception if improper intent



I. Overview of the FCPA

Who is a “Foreign Official”?

Foreign officials at all levels very broadly defined

- any officer or employee of a government or any department, agency, or instrumentality of a government;
- any person acting in an official capacity on behalf of a government;
- any officer or employee of a company or business owned in whole or part by a government;
- any officer or employee of a public international organization such as the World Bank or the United Nations;
- any officer or employee of a political party or any person acting in an official capacity on behalf of a political party; and/or
- any candidate for political office.

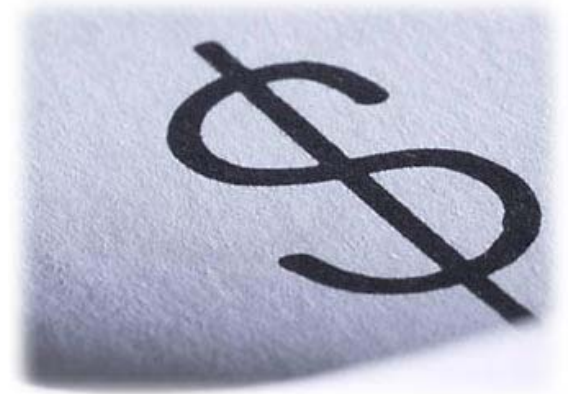


Health care providers and other employees of government-owned health care institutions are routinely considered to be “foreign officials”

I. Overview of the FCPA

Is the Payment to “Obtain or Retain Business”?

- Payment made to obtain or retain business by:
 - Influencing any official act or decision
 - Inducing official to do or omit to do acts in violation of official duties
 - Securing any improper advantage
 - Inducing official to influence acts of government
- Need not relate to a specific business opportunity
- Bribes with any “business nexus” such as to reduce foreign duties/taxes can violate FCPA



I. Overview of the FCPA

Is There a “Corrupt” Intent?

- Benefit conferred or offered to induce foreign official to abuse or misuse his/her position or authority through action or inaction
- Quid pro quo generally assumed
 - Gift/payment made with reasonable expectations of some official favor in return
 - Quid pro quo need not be executed
 - Official need not be able to deliver “quo” herself
- Government need not establish that defendant knew his/her conduct violated the FCPA

I. Overview of the 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; or
 - A firm belief as to the existence of such circumstance or that such circumstance will occur; or
 - 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.

I. Overview of the FCPA

Exceptions and Affirmative Defenses

- Exception
 - “Routine” governmental action - *i.e.*, “grease payments”
- Affirmative Defenses
 - Payments authorized by written foreign law
 - Bona fide business expenditures



I. Overview of the FCPA

Exception: “Routine” Governmental Action

- Anti-bribery rules do not apply to payment to secure “routine” governmental action
 - Prohibited by local law in many countries
- Examples
 - Obtain permits, licenses, visas
 - Secure police protection, timely official inspections
 - Provide phone, mail, power, water service, loading/unloading cargo, protecting perishable products
 - “Actions of a similar nature”
- Ministerial acts, not discretionary actions
- Perform official function faster, not make a different substantive decision

I. Overview of the FCPA

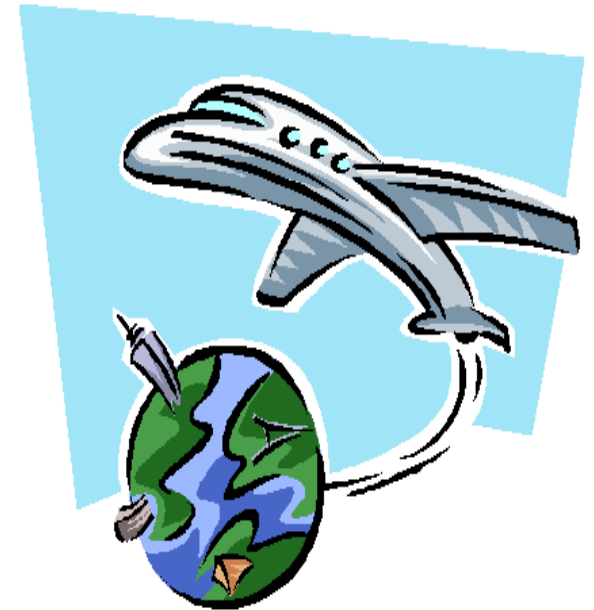
Affirmative Defense: Written Foreign Law

- Lawful under written law of host country
 - Informal business customs or practices NOT covered
- Examples
 - Lawful political contributions, modest gifts, training of officials
- Limited Utility
 - Must be explicitly authorized
 - Significant downside risks

I. Overview of the FCPA

Affirmative Defense: Bona Fide Expenditures

- Reasonable Business Expenditures
 - Directly related to legitimate promotional or contract activities
 - Reasonable under the circumstances
 - Bona fide and made in good faith
- Examples
 - Reimbursement for travel, meals, entertainment
 - Product samples
 - Customer training



I. Overview of the FCPA

Accounting Provisions

Books and Records Provision

- **Section 13(b)(2)(A)** “[M]ake and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”
- **Rule 13b2-1** “No person shall, directly or indirectly, falsify or cause to be falsified, any book, record or account subject to Section 13(b)(2)(A).”

I. Overview of the FCPA

Accounting Provisions

Internal Control Provision

Section 13(b)(2)(B) “[D]evise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that:

- i. transactions are executed in accordance with management’s general or specific authorization;
- ii. transactions are recorded as necessary (I) to permit the preparation of [GAAP compliant financial statements], and (II) to maintain accountability of assets;
- iii. access to assets is permitted only in accordance with management’s general or specific authorization; and
- iv. the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.”

I. Overview of the FCPA

Accounting Provisions

Other Observations On Accounting Provisions

- Amounts involved need not be “material.”
- “Scienter” is not a required element.

II. Jurisdictional Reach of the FCPA:

Issuers - §78dd-1

- Who is covered
 - any entity which has a class of securities registered under 15 U.S.C. § 78l
 - any entity which is required to file reports under 15 U.S.C. § 78o(d)
 - Includes non-U.S. companies who issue ADRs
- Liability requires use of means or instrumentality of interstate commerce
 - This requirement is easily satisfied (see *Statoil*: use of bank account in U.S. sufficient)

II. Jurisdictional Reach of the FCPA

Domestic Concerns - §78dd-2

- Who is covered
 - any individual who is a U.S. citizen, national, or resident
 - any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the U.S., or which is organized under U.S. laws
- U.S. companies may be liable for acts of non-U.S. affiliates

II. Jurisdictional Reach of the FCPA

Territorial Jurisdiction - §78dd-3

- Added as part of 1998 amendments
- Covers “persons other than issuers or domestic concerns”
- Requires an act in furtherance of corrupt payments “while in the territory of the United States”
 - DOJ has interpreted this to include *causing* an act to be taken in U.S. territory

II. Jurisdictional Reach of the FCPA

Territorial Jurisdiction - §78dd-3

- *Syncor*: Employees of Taiwanese subsidiary of U.S. company send fax to chairman in U.S. seeking authorization of unlawful payments
- *SSI*: Employees of Korean subsidiary of U.S. company conspire with employees of U.S. company to make unlawful payments; U.S. company wires funds from U.S. bank account
- *ABB Vetco Gray*: Employees of UK affiliates of U.S. company conspire with employees of U.S. company to make unlawful payments; UK company wires funds to agent in U.S.

III. Other Anti-Corruption Initiatives

OECD Anti-bribery Convention

- “Globalization” of U.S. law by Organization for Economic Cooperation & Development (OECD)
 - Establishes standard to be met by all Parties in defining offense of bribery of foreign officials, which is similar to FCPA
 - Calls upon Parties to take all necessary measures to establish bribery of foreign officials as a criminal offense
 - Requires Parties to adopt effective, proportionate and dissuasive criminal penalties for bribery of foreign officials
- Ratified by 30 OECD countries and 6 non-OECD countries
- All ratifying countries have enacted some form of implementing legislation
 - French implementing legislation amended in November 2007
 - Offenses include bribing and trading in influence with foreign public officials



III. Other Anti-Corruption Initiatives

Ratification of OECD Convention



Other OECD Countries



Australia



France



Japan



Poland



Austria



Germany



Korea



Portugal



Belgium



Greece



Luxembourg



Slovak Republic



Canada



Hungary



Mexico



Spain



Czech Republic



Iceland



The Netherlands



Sweden



Denmark



Ireland



New Zealand



Switzerland



Finland



Italy



Norway



Turkey



United Kingdom

Non-OECD Countries

• Argentina

• Brazil

+ • Bulgaria

• Chile

• Estonia

• Slovenia

III. Other Anti-Corruption Initiatives

United Nations Convention Against Corruption

- Entered into force on December 14, 2005
- Key Provisions:
 - Standards for corruption prevention applicable to both public and private sectors
 - Criminalization requirements for corruption offenses
 - International cooperation in the investigation and prosecution of cases
 - Asset recovery mechanisms and private rights of action for victims of corrupt practices
- Anticipate increased international cooperation in investigations and prosecutions



IV. Enforcement Climate

- Vigorous DOJ and SEC enforcement
- DOJ criminal penalties and charges for “knowing” violations
 - Fines: up to \$2,000,000 for entities; \$100,000 for individuals.
 - Imprisonment: up to 5 years.
 - *BAE Systems plc* (March 2010): \$400 million criminal fine
 - *Novo Nordisk* (2009): \$9 million criminal fine, \$3 million civil penalty, and \$6 million in disgorgement
 - *KBR/Halliburton* (2009): \$402 million criminal penalty and \$177 million disgorgement
 - *Siemens* (2008): \$800 million in combined U.S. criminal fines and disgorgement (in the aggregate, the largest FCPA sanction ever)
- No express private right of action
 - Private causes of action for treble damages under RICO.
 - Competitor could allege bribery caused defendant to secure a foreign contract

IV. Enforcement Climate

- SEC civil injunctive actions, civil penalties, disgorgement and independent consultants
 - *Titan Corp.* (2005): \$13 million penalty, \$15.479 million disgorgement, injunction, and independent consultant
 - *Monsanto* (2005): \$500,000 civil penalty and independent consultant (for three-year term)
 - *ABB Ltd.* (2004): \$10.5 million penalty, \$5.9 million disgorgement, injunction, and independent consultant
- Additional Collateral Consequences
 - OMB Guidelines
 - Indictment alone can lead to suspension of right to do business with U.S. government.
 - FCPA violators may be barred from doing business with U.S. government.
 - Negative Publicity
- Independent Compliance Monitors
 - Regulators taking a more nuanced approach to imposing monitors
 - Duration of monitor may increase (4 years in *Siemens*)

IV. Enforcement Climate

Indirect Liability

- Non-traditional “agent” liability
 - *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”

IV. Enforcement Climate

Gifts to Government-Controlled Entities

- Risk from hospitality / gifts / donations in commercial interactions with government-owned or –controlled entities
 - *DPC*: Improper payments to doctors and laboratory officials who controlled purchasing decisions at Chinese state-owned hospitals
 - *Schering-Plough*: Charitable contributions to the foundation whose president was also director of a regional Polish governmental health authority
 - *Syncor*: Improper payments to doctors employed by hospitals controlled by foreign authorities in Taiwan, Mexico, Belgium, Luxembourg, and France

IV. Enforcement Climate

Actions Against Non-U.S. Multinationals

– **BAE Systems plc (2010)**

- DOJ asserted jurisdiction over U.K. company based on alleged false statements to the U.S. government and alleged violations of the Arms Export Control Act.
- Certain improper payments to foreign government officials in Czech Republic, Hungary and Saudi Arabia were alleged, but no FCPA charges per se were brought; DOJ charged BAE with conspiracy to defraud the U.S. government because BAE did not tell the U.S. government about the improper payments.
- BAE agreed to a \$400 million criminal fine, three years' probation and independent monitor for three years.

– **Novo Nordisk (2009)**

- SEC/DOJ asserted jurisdiction over a Danish pharmaceutical company based on the company's American Depository Receipts being traded on the NYSE.
- Novo Nordisk agreed to a deferred prosecution agreement and paid a \$9 million criminal fine.
- It also paid a civil penalty \$3 million and disgorgement of \$6 million.

– **Siemens (2008)**

- SEC/DOJ asserted jurisdiction over a German conglomerate and its subsidiaries based on Siemens's American Depository Receipts being traded on the NYSE.
- In largest ever FCPA sanction, Siemens agreed to pay an aggregate of \$800 million in U.S. penalties and disgorgement.

– **Statoil (2006)**

- SEC/DOJ asserted jurisdiction over Norway's largest oil company based on fact that Statoil's American Depository Receipts traded on the NYSE.
- Despite investigation by Norwegian authorities, Statoil agreed to a three-year deferred prosecution agreement and paid a total of \$21 million in criminal penalties and disgorgement.

IV. Enforcement Climate

Joint Ventures and Partnerships

- “Offers” to pay bribe prohibited.
- Payments by non-U.S. joint ventures actionable if U.S. 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.
- Corrupt payments through intermediaries prohibited.
 - Intermediaries include joint venture partners or agents.
- Vicarious liability for illicit payments by a joint venture partner if the partner deemed an “agent” of the U.S. issuer.

IV. Enforcement Climate

Investigation and Prosecution of Individuals

- Three criminal FCPA trials in 2009, all resulting in the conviction of individuals
 - Bourke
 - Cong. Jefferson
 - Greens
- Undercover sting operation resulting in 22 individuals being arrested and charged with FCPA violations
 - More such operations promised to be in the works

V. FCPA Enforcement in the M&A Context

- Expectation by SEC / DOJ that companies perform due diligence in M&A context with voluntary disclosure of issues
- Recent cases where FCPA violations have been discovered in the course of pre-acquisition due diligence
 - Collapse of Lockheed Martin's proposed \$1.6 billion acquisition of Titan.
 - Deferred prosecution agreement entered into by Invision Technologies, Inc. prior to acquisition by GE.
 - SEC / DOJ settlements by Syncor, Inc. prior to acquisition by Cardinal Health.
 - ABB, Ltd. and ABB Vetco settlement involving \$10.5 million criminal fine and \$5.9 million disgorgement.

V. FCPA Enforcement in the M&A Context

Successor Liability

- Successor liability generally attaches in stock transfer or merger
 - Transfer of equity typically transfers both the assets *and* the liabilities of the target entity after closing
- Successor liability may attach in an asset purchase
 - Involves a nuanced inquiry into the facts and circumstances regarding the specific acquisition
 - One of several broad exceptions to general rule of no successor liability in the context of an asset purchase is when ***the purchasing entity is merely a continuation of the selling corporation***
 - Purchase agreements may specify which liabilities transfer with assets

V. FCPA Enforcement in the M&A Context

Successor Liability

Two significant factors in determining successor liability:

- The extent of the due diligence conducted to identify and address potential issues; and
- The extent and effectiveness of safeguards adopted upon acquisition to prevent reimbursement by the acquirer of improper actions and to prevent them in the future.

V. FCPA Enforcement in the M&A Context

The Buyer's Perspective

- The Buyer wants to avoid:
 - Paying penalties and other fines
 - Other additional expenses, including costs of hiring and maintaining a compliance monitor
 - Debarment
 - Other civil actions, including shareholder actions and RICO violations
 - Negative publicity
 - Cancelled transaction
 - *See e.g., Titan Corp.*, during pre-acquisition due diligence Lockheed discovered significant FCPA violations that not only resulted in the cancellation of the proposed transaction, but also stiff penalties imposed upon Titan

V. FCPA Enforcement in the M&A Context

Buyer's Goals

- Avoid acquiring liability for past or ongoing FCPA violations (Successor Liability)
- Ensure that seller covers costs of violations
- Maintain maximum value of acquired entity
 - Key personnel
 - Key contracts and markets
 - Key relationships

V. FCPA Enforcement in the M&A Context

Seller's Perspectives

- Increased enforcement also affects a Seller's actions
- Goal of Seller:
 - Ensure that disclosures regarding material contractual provisions such as representations are not misleading
- Result:
 - Internal assessments, also referred to as “health checks”
 - Health checks assess seller's FCPA compliance program and other internal controls
 - Also allow sellers to anticipate whether the sales price can be challenged due to unknown FCPA problems

V. FCPA Enforcement in the M&A Context

What Protective Steps Are Necessary?

- Due diligence on target prior to signing the purchase agreement
- FCPA-related provisions included in the purchase agreement
- Additional due diligence, and begin compliance training between the signing of purchase agreement and closing
- Extensive compliance training and compliance program push-down immediately after closing

V. FCPA Enforcement in the M&A Context

Factors to Consider in Designing Pre-Merger FCPA Due Diligence Steps

- Little available authority on required due diligence steps – “an art, not a science”
- Educate diligence team on FCPA issues
- Factor in necessary time for FCPA review – process likely will require phases of review as review team receives information and encounters red flags
- Follow-up on identified red flags and risk areas
- Document due diligence steps

V. FCPA Enforcement in the M&A Context

Pre-acquisition FCPA due diligence checklist

- 1. Assess corruption levels of the country in which the target entity does business**
 - Transparency International Index
 - Do not ignore small or remote operations
- 2. Investigate identity of the target entity**
 - Internet / other background check on target
 - Search for government affiliations, political party affiliations and any other relationships with government officials or government-affiliated agencies
 - Dun & Bradstreet reports, Commerce, State, Treasury restricted parties lists and US Embassy check

V. FCPA Enforcement in the M&A Context

Pre-acquisition FCPA due diligence checklist

3. Review of the target entity's existing FCPA compliance program and controls

- Clear policies and procedures
- Senior management oversight
- Third party agent due diligence and certifications
- Regular training
- Hotline reporting mechanisms

4. Test adequacy of the target entity's books and records / internal controls.

- Financial controls
- Red flag transactions

V. FCPA Enforcement in the M&A Context

Pre-acquisition FCPA due diligence checklist

5. Evaluate target's risk profile

- Frequent interactions with government officials either as customers or regulators
- Reliance on third party agents and consultants
 - Demonstrated business need and correlating compensation
 - Due diligence files
 - Anti-bribery certifications
- Compliance with local laws and regulations

6. Identify any prior instances of FCPA issues or violations

- Government investigations, settlements, plea agreements
- Internal investigations
- Internal audit reports
- Annual report / SEC filing disclosures
- Hotline reports

V. FCPA Enforcement in the M&A Context

Protection through the Purchase Agreement

- Representations and Warranties
 - Participation in transactions permitted by local law
 - No portion of the proceeds paid by the company will be used to fund payments in connection with securing government approvals, improper advantages, etc.
 - No corrupt payments were made to foreign officials in connection with entering into or securing necessary approvals
 - Absence of government officials as owners or in other relevant positions
 - Books and records are accurate and complete

V. FCPA Enforcement in the M&A Context

Protection through the Purchase Agreement

- Termination
 - Right to terminate relationship if any representations are materially untrue or if other covenants breached
- Indemnification
 - Right of indemnification for any damages caused by material breach

V. FCPA Enforcement in the M&A Context

DOJ Opinion Procedure Releases

- **DOJ Opinion Procedure Release 03-01:** Purchaser learned in the course of pre-acquisition due diligence that target had made potentially improper payments to foreign officials
- Purchaser promised to:
 - (1) continue to cooperate with the DOJ, SEC and foreign law enforcement agencies;
 - (2) ensure that the responsible employees or officers are disciplined;
 - (3) disclose any additional discovered pre-acquisition payments made by the company to the DOJ after the deal closes;
 - (4) implement its existing compliance program throughout the acquired company; and
 - (5) ensure that the acquired company implements a sufficient system of internal controls and maintains accurate books and records.
- Based on the foregoing, DOJ allowed the transaction to proceed and stayed any enforcement action against the Purchaser

V. FCPA Enforcement in the M&A Context

DOJ Opinion Procedure Releases

- **DOJ Opinion Procedure Release 08-02:** DOJ endorsed a pragmatic approach to a situation where legal and practical impediments prevented Halliburton from performing thorough, pre-acquisition due diligence.
- DOJ reinforced expectation that an acquiring company combine thorough pre-acquisition due diligence with rapid post-acquisition push-down of its compliance program into the acquired company.
- DOJ reemphasized its view that voluntary disclosure and prompt remedial efforts are critical when FCPA issues are uncovered.

Appendix: Actual FCPA Prosecutions

U.S. v. BAE Systems plc (March 2010)

Background:

- BAE Systems plc, located in England, is the world's second largest defense contractor and the fifth largest provider of defense materials to the U.S. government.
- DOJ alleges that BAE made certain false statements to the U.S. Department of Defense, including that BAE had implemented sufficient mechanisms for its non-U.S. business to ensure compliance with the FCPA and other U.S. laws.
- DOJ alleges that BAE made undisclosed and improper payments associated with sales in the Czech Republic, Hungary and Saudi Arabia and conspired to defraud the U.S. government in connection with these sales.

U.S. v. BAE Systems plc (March 2010)

The Result:

- BAE Systems plc entered a plea agreement in which it pleaded guilty to one count of a Conspiracy to Defraud the U.S. Government under 18 U.S.C. Section 371.
- BAE agreed to pay a criminal fine of \$400 million, be under probation for three years, and have an independent monitor for a period of three years.
- Separately, BAE agreed to a settlement agreement with U.K. authorities.

U.S. v. Novo Nordisk (May 2009)

Background:

- Danish pharmaceutical company paid \$1.4 million in kickbacks and agreed to pay an additional \$1.3 million in kickbacks in connection with its sale of humanitarian goods to Iraq under the U.N. Oil for Food Program.
- The kickbacks were in the form of “after sales service fees” that were paid through a third-party agent and concealed through a corresponding increase in the contract price. The kickback was then recovered through disbursements from the U.N. escrow account when the inflated contracts were paid by the U.N.

SEC v. Novo Nordisk (May 2009)

The Result:

- Novo Nordisk entered a deferred prosecution agreement with the DOJ for conspiracy to commit wire fraud and to falsify books and in violation of the FCPA. It paid a \$9 million monetary penalty.
- The company also paid a \$3 million civil penalty and \$6 million in disgorgement for violating books and records provisions of FCPA, and it consented to the entry of a permanent injunction.
- The company agreed to specific undertakings, including implementing a compliance and ethics program designed to detect and prevent FCPA violations.

U.S. v. Siemens (December 2008)

Background:

- Beginning in the mid-1990's, Siemens engaged in a pattern of bribery that was "unprecedented in scale and geographic reach."
- The German parent corporation, Siemens AG, systematically falsified its books and records and knowing circumvented its internal controls to conceal various payments to totaling approximately \$1.36 billion. Approximately \$800 million of those payments were intended in whole or part as corrupt payments to foreign officials through slush funds or cash desks.
- Siemens Argentina made approximately \$31 million in payments to various Argentine officials in exchange for favorable business treatment in connection with a \$1 billion national identity card program.

U.S. v. Siemens (December 2008)

- Siemens Venezuela made \$18 million in corrupt payments to various Venezuelan officials in exchange for favorable business treatment in connection with two major metropolitan mass transit projects.
- Siemens Bangladesh made corrupt payments of approximately \$5 million through purported business consultants to various Bangladeshi officials in exchange for favorable treatment during the bidding process on a mobile telephone project.
- Four Siemens subsidiaries—including Siemens France—paid kickbacks to the Iraqi government as part of the U.N. Oil for Food Program. The four subsidiaries inflated the prices of their contracts with the Iraqi government before submitting them to the U.N. for approval. They also maintained false books and records related to these contracts.

U.S. v. Siemens (December 2008)

The Result:

- Siemens AG pleaded guilty to 2 counts of criminal violations of the FCPA's books and records and internal control provisions.
 - Siemens Venezuela and Siemens Bangladesh each pleaded guilty to 1 count of criminal conspiracy to violate the FCPA's anti-bribery and books and records provisions.
- Siemens Argentina pleaded guilty to 1 count of criminal conspiracy to violate the FCPA's books and records provisions.
- Siemens agreed to pay an aggregate \$450 million criminal penalty.

U.S. v. Siemens (December 2008)

- Siemens also agreed to pay \$350 million in disgorgement to the SEC.
- Siemens simultaneously resolved charges with the Munich Public Prosecutor's Office and paid €395 million.
 - This payment was in addition to the €201 it had previously paid to the Munich Public Prosecutor's Office to resolve a related matter in October 2007.
- Company had to retain an independent compliance monitor for a four-year period to oversee the continued implementation and maintenance of a robust compliance program.

U.S. v. STATOIL, ASA (S.D.N.Y. 2006)

Background:



- STATOIL, ASA is a public company organized under the laws of the Kingdom of Norway, which is in the business of exploring for, producing and selling oil and natural gas resources around the world.
- The company has American Depositary Shares (ADRs) that traded on the New York Stock Exchange; thus, STATOIL is an “issuer” with the meaning of the FCPA.
- In November 2000, STATOIL entered into a Cooperation Agreement with a subsidiary of the National Iranian Oil Company (NIOC) which identified areas of mutual interest for future cooperation.
- The Iranian Government Official in charge of the NIOC subsidiary met with STATOIL’s senior employees in Norway, including the chief advisor to the CEO, in August 2001; they learned that the Iranian Government Official was an advisor to Iran’s oil minister and that the Official’s family was powerful and influential in the oil and gas business in Iran.

U.S. v. STATOIL, ASA (S.D.N.Y. 2006)

- The CEO of STATOIL approved entering into a Consulting Contract that obligated STATOIL to pay the Iranian Official a total of \$15.2 million over approximately 11 years; the payments under the Consulting Contract were structured as payments for vaguely-defined consulting services through an off-shore intermediary company owned by a third party in London; the Consulting Contract did not name the Iranian Official.
- During the period June 2002 through January 2003, STATOIL, through a bank account in New York, wire transferred over \$5.2 million to the Iranian Official, in return for receiving non-public information concerning oil and gas projects in Iran, including copies of bid documents of competing companies.
- In October 2002, STATOIL was awarded a contract from the Iranian government to develop a major Iranian oil and gas field.

U.S. v. STATOIL, ASA (S.D.N.Y. 2006)

The Result:

- On October 13, 2006, the Company consented to an Order filed by the SEC requiring STATOIL to pay disgorgement of \$10.5 million to the U.S. Treasury and also requiring that STATOIL engage and pay for a Compliance Consultant, and adopt all of the Consultant's recommendations, unless they are shown to be unduly burdensome or costly.
- In a parallel investigation, the Norwegian government authorities imposed a penalty of approximately \$3.0 million on STATOIL and a penalty of approximately \$30,000 on a Senior Executive of STATOIL.

U.S. v. SSI International Far East, Ltd. (D. Oregon 2006)

Background:

- Schnitzer Steel Industries (SSI) is headquartered in Portland, Oregon.
- SSI International Far East, Ltd. (SSI Korea) is a wholly-owned subsidiary of SSI, organized under the laws of the Republic of Korea (South Korea). SSI Korea assisted in the sale of scrap metal to Schnitzer customers in South Korea and China.
- SSI Korea transmitted requests to the U.S. for approval and wire transfer of funds for payments to managers of SSI customers in South Korea and China; therefore, SSI Korea acted within the territorial jurisdiction of the U.S.



U.S. v. SSI International Far East, Ltd.

(D. Oregon 2006)

- During the period September 1999-May 2004, SSI Korea and SSI paid over \$205,000 in improper payments to managers of its government-owned customers in China in connection with 30 sales transactions. SSI's gross revenue for those transactions totaled \$96 million, and SSI earned \$6.3 million in net profits on the sales.
- During the same time period, SSI Korea and SSI employees also spent approximately \$138,000 in gift and entertainment expenses for managers of their customers in China and South Korea, including jewelry, gift certificates, perfume, and the use of SSI Korea's golf club membership and condominium timeshare.

©EnchantedLearning.com

U.S. v. SSI International Far East, Ltd.

(D. Oregon 2006)

- In May 2004, SSI's compliance department uncovered the improper payments and SSI began to investigate the potential FCPA violations. At that time, a senior executive of SSI prohibited any further payments, but nonetheless authorized SSI employees to increase entertainment expenses in lieu of cash payments to its customers. In response, SSI employees gave customers' managers additional gifts, including gift certificates worth \$10,000 and a watch worth \$2,400.
- Several months after SSI began its internal investigation, but before it issued a document hold memo, SSI Korea employees destroyed documents concerning the improper payments.

U.S. v. SSI International Far East, Ltd. (D. Oregon 2006)

The Result:

- On October 16, 2006, SSI Korea entered a guilty plea to criminal violations of the Anti-Bribery and Books and Records provisions of the FCPA; the parent company, SSI, entered into a deferred prosecution agreement with DOJ and SSI Korea agreed to pay a \$7.5 million criminal fine.
- On the same day, SSI agreed to a cease-and-desist order with the SEC, agreed to pay disgorgement and prejudgment interest in the total amount of \$7.7 million, and agreed to engage and pay for a Compliance Consultant.

U.S. v. Diagnostic Products Corporation (May 2005)

Background:

- From 1991 through 2002, the Chinese subsidiary of Diagnostic Products Corporation (“DPC”) paid approximately \$1.6 million in bribes to physicians and laboratory personnel in government-owned hospitals in China.
- The bribes were cash payments in the form of “commissions” that were paid to the person who controlled purchasing decisions for the particular hospital department.
- The commissions were authorized by the Chinese subsidiary’s general manager and were included in the affiliate’s financial statements submitted to DPC.

U.S. v. Diagnostic Products Corporation (May 2005)

The Result:

- The company paid a \$2 million criminal penalty and \$2.8 million in disgorgement and interest.
- The Chinese subsidiary pleaded guilty to a criminal violation of the FCPA.
- DPC agreed to the entry of a cease and desist order.
- DPC was also required to engage an independent compliance monitor to review the company's FCPA compliance for three years.

SEC v. Schering-Plough Corp. (June 2004)

Background:

- Polish branch office of Schering-Plough subsidiary, Schering-Plough Poland (SPP), paid approximately \$74,000 to a Polish charitable foundation between 1999 and 2002.
- The founder of the foundation was the Director of one of sixteen regional health authorities in Poland.
- The regional health authority provided monies for the purchase of pharmaceutical products and influenced the purchase of those products by hospitals and other entities.
- The foundation had nothing to do with health care, but SPP's contributions were solicited by the Director of the regional health authority.

SEC v. Schering-Plough Corp. (June 2004)

The Result:

- \$500,000 civil penalty for violating books and records provisions of FCPA.
- Cease and desist order.
- Company had to retain an Independent Consultant, approved by the SEC, to review and evaluate internal controls, record-keeping, etc.
- Independent Consultant's recommendations must be adopted by Company, unless it can show them to be unduly burdensome, impractical or costly, and propose adequate alternative.

JOSEPH B. TOMPKINS,
JR.
Partner



Washington, D.C.
202.736.8213
202.736.8711 Fax

jtompkins@sidley.com

PRACTICES

- Complex Commercial Litigation
- International Trade
- White Collar

AREAS OF FOCUS

- Business Torts
- Class Action and Multidistrict Litigation
- Compliance Counseling - White Collar
- Contract Litigation
- Customs
- Economic Sanctions
- Export Controls
- FCPA/Anti-bribery
- Financial Institutions Counseling
- Financial Institutions Litigation
- Grand Jury Investigations
- Internal Investigations
- International Financial Institutions in the U.S.
- Private Securities Litigation
- Real Estate Litigation
- Trials

ADMISSIONS & CERTIFICATIONS

- U.S. Supreme Court, 1977
- U.S. Court of Appeals, 3rd Circuit, 1983
- U.S. Court of Appeals, 4th Circuit, 1993
- U.S. Court of Appeals, 5th Circuit, 1977
- U.S. Court of Appeals, 6th Circuit, 1985
- U.S. Court of Appeals, 7th Circuit, 1991
- U.S. Court of Appeals, 9th Circuit, 1985
- U.S. Court of Appeals, 11th Circuit, 1982
- U.S. Court of Appeals, D.C. Circuit, 1976
- U.S. Court of Appeals, Federal Circuit, 1985
- U.S. District Court, District of Columbia
- U.S. District Court, E.D. of Virginia
- District of Columbia, 1976
- Virginia, 1975

EDUCATION

- Harvard Law School (J.D., 1975)
- Harvard University - John F. Kennedy School of Government (M.P.P., 1975)
- Washington and Lee University (B.A., 1971, *summa cum laude*)

JOSEPH B. TOMPKINS, JR.'s experience includes service with the Criminal Division of the United States Department of Justice from 1979-1982, where he served as Deputy Chief of the Fraud Section from 1980-1982. He also has served as Chairman of the American Bar Association Task Force on Computer Crime. Mr. Tompkins serves as Global Coordinator of the firm's Complex Commercial Litigation practice group. His practice includes a variety of civil and white collar criminal litigation matters. In recent years, Mr. Tompkins has represented corporate and individual clients in connection with complex internal investigations, commercial litigation in federal and state courts, Department of Justice and Securities and Exchange Commission investigations, and federal grand jury investigations concerning alleged fraud, corruption and export control violations.

Mr. Tompkins has also represented corporate and individual clients in international law enforcement matters, including Foreign Corrupt Practices Act investigations, economic sanctions, export control investigations and related matters. He has also drafted and negotiated international agreements between the United States and foreign entities. Mr. Tompkins is currently leading the Firm's representation of Bank of America in the Multi-District Litigation proceeding involving Parmalat, the Italian dairy company that engaged in a massive international fraud. He has also represented a number of other major financial institutions that have been the victims of fraud and corrupt activity, including the World Bank and other domestic and international banks. Mr. Tompkins regularly represents clients such as the U.S. Chamber of Commerce, MasterCard International, Caterpillar, the Cayman Islands Monetary Authority and the government of the Cayman Islands in a broad range of regulatory and litigation matters.

World Offices

BEIJING

Suite 608, Tower C2
Oriental Plaza
No. 1 East Chang An Avenue
Dong Cheng District
Beijing 100738
China
T: 86.10.6505.5359
F: 86.10.6505.5360

BRUSSELS

Square de Meeûs, 35
B-1000 Brussels
Belgium
T: 32.2.504.6400
F: 32.2.504.6401

CHI CAGO

One South Dearborn
Chicago, Illinois 60603
T: 312.853.7000
F: 312.853.7036

DALLAS

717 North Harwood
Suite 3400
Dallas, Texas 75201
T: 214.981.3300
F: 214.981.3400

FRANKFURT

Taunusanlage 1
60329
Frankfurt am Main
Germany
T: 49.69.22.22.1.4000
F: 49.69.22.22.1.4001

GENEVA

Rue de Lausanne 139
Sixth Floor
1202 Geneva
Switzerland
T: 41.22.308.00.00
F: 41.22.308.00.01

HONG KONG

Level 39
Two Int'l Finance Centre
8 Finance Street
Central, Hong Kong
T: 852.2509.7888
F: 852.2509.3110

LONDON

Woolgate Exchange
25 Basinghall Street
London, EC2V 5HA
United Kingdom
T: 44.20.7360.3600
F: 44.20.7626.7937

LOS ANGELES

555 West Fifth Street
Los Angeles, California 90013
T: 213.896.6000
F: 213.896.6600

NEW YORK

787 Seventh Avenue
New York, New York 10019
T: 212.839.5300
F: 212.839.5599

PALO ALTO

1801 Page Mill Road
Suite 110
Palo Alto, California 94304
T: 650.565.7000
F: 650.565.7100

SAN FRANCISCO

555 California Street
San Francisco, California 94104
T: 415.772.1200
F: 415.772.7400

SHANGHAI

Suite 1901
Shui On Plaza
333 Middle Huai Hai Road
Shanghai 200021
China
T: 86.21.2322.9322
F: 86.21.5306.8966

SINGAPORE

6 Battery Road
Suite 40-01
Singapore 049909
T: 65.6230.3900
F: 65.6230.3939

SYDNEY

Level 10, 7 Macquarie Place
Sydney NSW 2000
Australia
T: 61.2.8214.2200
F: 61.2.8214.2211

TOKYO

Sidley Austin Nishikawa
Foreign Law Joint Enterprise

Marunouchi Building 23F
4-1, Marunouchi 2-chome
Chiyoda-Ku, Tokyo 100-6323
Japan
T: 81.3.3218.5900
F: 81.3.3218.5922

WASHINGTON, D.C.

1501 K Street N.W.
Washington, D.C. 20005
T: 202.736.8000
F: 202.736.8711

Sidley Austin LLP, a Delaware limited liability partnership which operates at the firm's offices other than Chicago, London, Hong Kong, Singapore and Sydney, is affiliated with other partnerships, including Sidley Austin LLP, an Illinois limited liability partnership (Chicago); Sidley Austin LLP, a separate Delaware limited liability partnership (London); Sidley Austin LLP, a separate Delaware limited liability partnership (Singapore); Sidley Austin, a New York general partnership (Hong Kong); Sidley Austin, a Delaware general partnership of registered foreign lawyers restricted to practicing foreign law (Sydney); and Sidley Austin Nishikawa Foreign Law Joint Enterprise (Tokyo). The affiliated partnerships are referred to herein collectively as Sidley Austin, Sidley, or the firm.