

FCPA Enforcement Against U.S. and Non-U.S. Executives and Employees

Identifying FCPA Risks and Overcoming Compliance Challenges

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Today's faculty features:

James G. Tillen, Member, **Miller Chevalier**, Washington, D.C.

James T. Parkinson, Partner, **BuckleySandler**, Washington, D.C.

Lara Covington, Special Counsel, **Schulte Roth & Zabel**, Washington, D.C.

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Lara Covington

Special Counsel

Schulte Roth & Zabel LLP

James T. Parkinson

Partner

BuckleySandler LLP

James G. Tillen

Member

Miller & Chevalier

Schulte Roth&Zabel



Prosecuting Individuals: A Deliberate Enforcement Priority

"Not only does corruption undermine the public trust and weaken democratic institutions; it also creates gaps in government structures that organized criminal groups and terrorist networks can exploit. In short, corruption is a 'gateway crime' that we must do everything we can, working with others around the globe, to stamp out."

*Lanny Breuer, Assistant Attorney General
Criminal Division, DOJ*

Prosecuting Individuals: A Deliberate Enforcement Priority

“The only impact on matters of this sort is a jail sentence....

Who is going to jail?”

*Sen. Arlen Specter, Sen. Judiciary Comm.,
Subcomm. on Crime and Drugs,
Hearing on Enforcement of the FCPA*

Prosecuting Individuals: A Deliberate Enforcement Priority

“We are also vigorously pursuing individual defendants who violate the FCPA, and we will not hesitate to seek jail terms for these offenders when appropriate. The Department has made the prosecution of individuals a critical part of its FCPA enforcement strategy. We understand well that this is an important and effective deterrent.”

*Acting Dep’y Asst. Att’y Gen. Greg Andres, Sen. Judiciary
Comm., Subcomm. on Crime and Drugs,
Hearing on Enforcement of the FCPA*

Overview of Session

- Individual liability under FCPA
 - Basis of liability
 - Individual roles
 - Harmonization of FCPA with local law
- Recent enforcement
 - Against non-US executives and employees
 - Against US executives and employees
- Identification of FCPA risks and strategies to minimize risks
 - Execs/finance individuals and corresponding company risk
 - Legal/compliance/board members and corresponding company risk
 - Fund managers and corresponding company risk

Enforcement Actions Against Individuals

- Under FCPA, both the US Department of Justice and the US Securities and Exchange Commission may investigate and charge
 - Sometimes charged by both at the same time
 - Sometimes separate actions
 - May be non-US jurisdictions investigating, too
- Individuals subject to enforcement actions:
 - US and non-US citizens
 - US-based and based outside the US
 - Employees and agents
 - High level employees and line employees

Enforcement Actions Against Individuals

- Stages of enforcement action:
 - Investigation
 - Indicted or charged
 - Trial
 - Finding of guilt or liability
 - Sanctions (incarceration, fine, other impacts)
- Examples
 - Agent
 - Non-US citizens formerly employed by German issuer

Individual Liability Under the FCPA

Basis for Individual Liability Under the FCPA

- As the “officer, director, employee, or agent” of an issuer or domestic concern. (15 U.S.C. §§ 78dd-1(a), 78dd-2(a))
- As a “citizen, national, or resident of the United States,” whether or not the conduct occurs in the U.S. (15 U.S.C. § 78dd-2(a), (h)(1)(A), (i))
- As “any person other than an issuer ... or a domestic concern,” including “any natural person other than a national of the United States”
 - When that person, while in the territory of the United States, makes use of the mails or any means or instrumentality of interstate commerce or does any act in furtherance of an improper payment (15 U.S.C. § 78dd-3(a), (f)(1))

Basis for Individual Liability Under the FCPA

- The FCPA prohibits ***direct*** transactions
- It also prohibits ***indirect*** transactions – corrupt payments through intermediaries
- Intermediaries may include joint venture partners, consultants, agents, distributors, or professional services firms

Basis for Individual Liability Under the FCPA

- What does it mean, in the context of the FCPA, to do something:
 - Knowingly
 - Corruptly
 - Willingly

Practically, What Constitutes “Knowledge” Under the FCPA?

It is unlawful for “any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign official...”

(15 U.S.C. § 78dd-1(a)(3))

Knowledge includes:

- Actual knowledge
- Awareness or suspicion that an event is likely to occur
- Avoiding knowledge of corrupt acts through willful blindness

“When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.”

(15 U.S.C. § 78dd-1(f)(2)(B))

“Knowledge” Under the FCPA

“[T]he requisite "state of mind" for this category of offense include[s] a "conscious purpose to avoid learning the truth."

(H.R. Conf. Rep. No. 100-576, at 919 (1988))

“Thus the "knowing" standard ... covers both prohibited actions that are taken with "actual knowledge" of intended results as well as other actions that, while falling short of what the law terms "positive knowledge," nevertheless evidence a conscience disregard or deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the Act.”

(H.R. Conf. Rep. No. 100-576, at 919 (1988))

Corrupt Intent

- A person acts “corruptly” if he or she commits an act with a bad or wrongful purpose and an intent to influence a foreign official to misuse his official position
- Corrupt intent includes:
 - Influencing any act or decision of an official
 - Inducing an official to do or omit any act in violation of his or her lawful duty
 - Inducing an official to use his or her influence or affect any governmental act or decision

Willfulness

“A person acts “willfully” if he acts deliberately and with the intent to do something that the law forbids, that is, with a bad purpose to disobey or disregard the law. The person need not be aware of the specific law and rule that his conduct may be violating, but he must act with the intent to do something that the law forbids.”

Jury Charge, United States v. Bourke,
Cr. 05-518 (SAS) (S.D.N.Y. 2009)

Control Person Liability

“Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person ..., unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.”

(Securities Exchange Act of 1934, § 20(a))

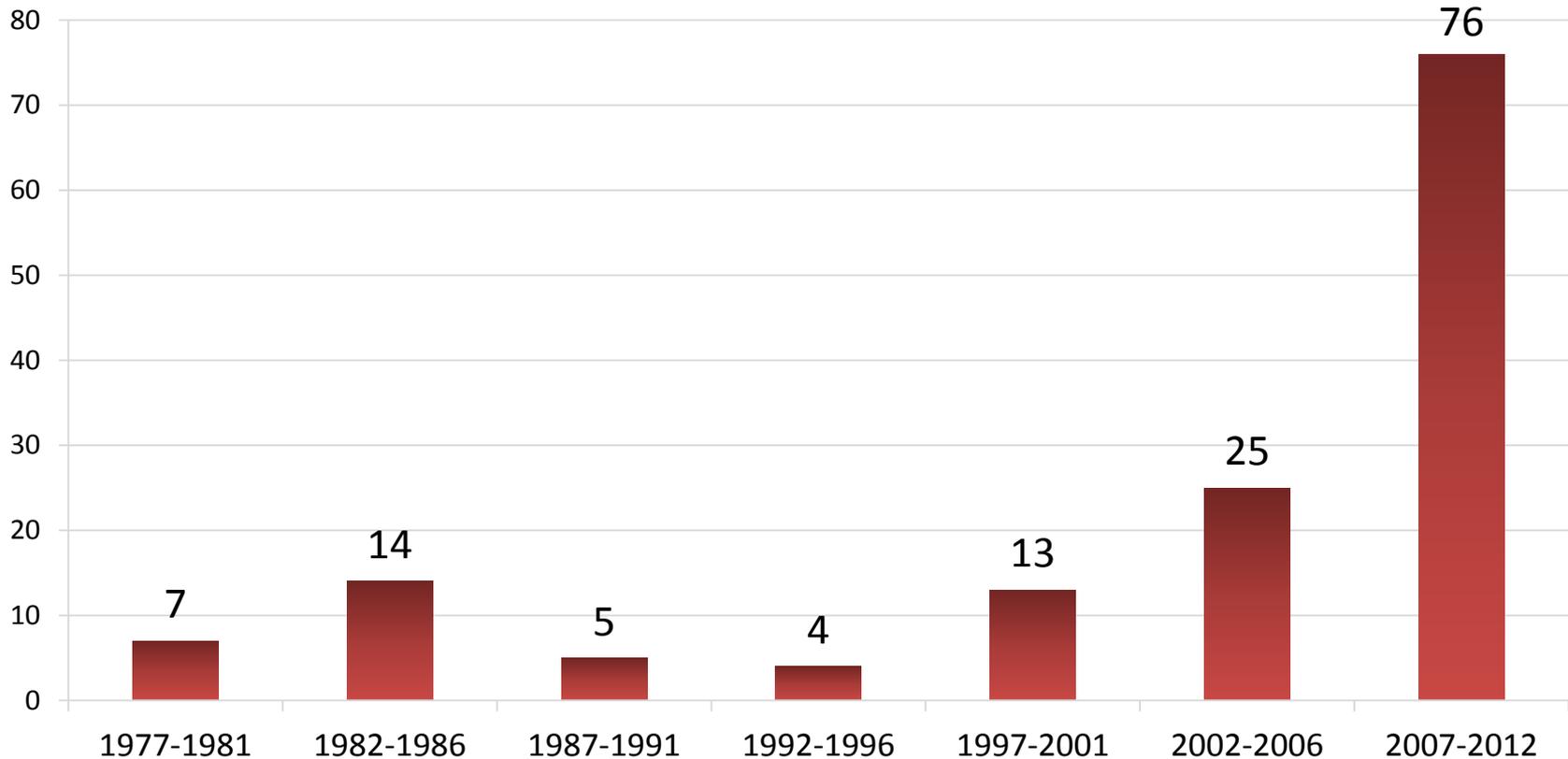
Recent Enforcement

Individual Liability: Enforcement Trends

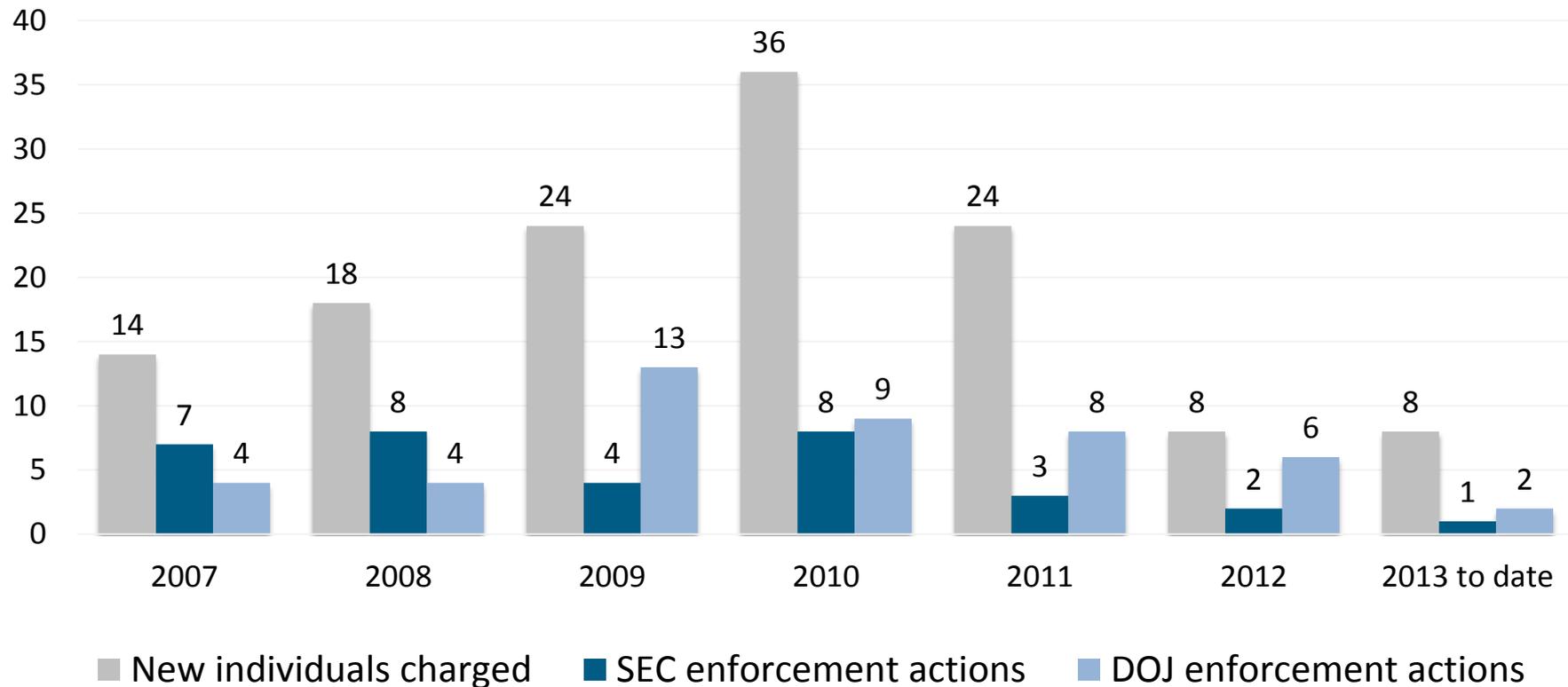
- U.S. enforcement authorities have repeatedly identified the prosecution of individuals as a “cornerstone” of its FCPA enforcement strategy
- Since 1998, DOJ alone has charged well over 100 individuals for FCPA-related offences
 - Among these are dozens of non-US citizens, including executives and agents for Siemens, KBR, Alstom, Deutsche Telekom and CCI
- Of more than 70 individuals convicted under FCPA since 1998:
 - More than 70% sentenced to imprisonment, with terms ranging from a period of months to up to 15 years
 - Nearly all received several years of probation, sometimes with a period of home confinement
 - Fines/forfeiture imposed ranged from \$1,000 to over \$149 million

Individual Liability: Civil and Criminal Enforcement

Resolved FCPA Actions Against Individuals (DOJ and SEC)
1977 Through 2012



Individual Liability: Overview of Resolved Enforcement Involving Individuals By Year



Note: Updated through May 30, 2013. The column “new individuals charged” includes all such individuals, irrespective of whether they have resolved the charges. Individuals charged by both agencies are included in this column twice. These statistics include the guilty plea of James Giffen, although this technically did not involve an FCPA charge..

Actions Against Non-US Individuals: Jurisdiction

- DOJ/SEC aggressively interpret the jurisdictional reach of FCPA over non-US nationals
 - For non-US nationals who are employees or agents of issuers or domestic concerns, US may assert jurisdiction if individual uses interstate commerce — through a telephone call, e-mail, or wire transfer, for example — to further an improper payment
 - For non-US nationals who are not affiliated with issuer or domestic concern, agencies assert jurisdiction if individual (either directly or through an agent) takes action while in US territory
- Agencies also stress other jurisdictional bases, such as conspiracy to commit or aiding and abetting FCPA violations

Jurisdiction: Enforcement Examples

- For example, enforcement agencies have asserted jurisdiction over:
 - Three Hungarian executives on basis of emails routed through and/or stored on network servers located within US (*Magyar Telecom*)
 - Japanese engineering, procurement, and construction company on basis of payments to be transferred between two European bank accounts via correspondent accounts in US (*JGC Corp.*)
 - Chinese subsidiary of a US medical company on basis of telephone calls, faxes and e-mails sent to US (*DPC Tianjin*)
 - Korean subsidiary of a US steel company on basis of requests for approval and wire transfers that were transmitted to US (*SSI Korea*)

Jurisdiction: Testing Jurisdictional Reach

- Assertions of jurisdiction by agencies have rarely been challenged head-on
- Recent cases, however, have tested jurisdictional reach:
 - In 2011, court dismissed criminal FCPA charge against UK executive where jurisdiction based on package sent from UK to DC (*US v. Patel*)
 - In 2013, court held SEC lacked jurisdiction over German executive at Siemens Argentina because he "neither authorized the bribe, nor directed the cover up, much less played any role in the falsified filings" (*SEC v. Sharef*)
 - Conversely, in 2013, court found jurisdiction existed over three Hungarians because as executives at Magyar Telekom they allegedly authorized bribes, structured sham contracts and played key roles in Deutsche Telekom's false filings (*SEC v. Straub*)

Recent Enforcement: US Individuals

- Enforcement against individuals
 - Government priority
 - Trends
- Recent activity:
 - Pending cases
 - Sentences
 - Resolutions

Recent Enforcement: US Individuals

"It is our view that to have a credible deterrent effect, people have to go to jail. People have to be prosecuted where appropriate. [The FCPA] is a federal crime. This is not fun and games."

*Mark Mendelsohn,
former Deputy Chief of the Fraud Section at DOJ*

Recent Enforcement: US Individuals

- ***US v. Pierucci, et al.*** (pending)
 - William Pomponi worked for Alstom, a French company
 - Allegedly paid bribes to a parliament member and official of a state-owned entity from 2002-2009
 - Trends:
 - Use of consultants
 - State-owned entity
 - International cooperation?

Recent Enforcement: US Individuals

- ***US v. Clarke, et al., SEC v. Clarke, et al.*** (pending)
 - Tomas Clarke and Jose Hurtado worked out of the Miami office of broker-dealer, Direct Access Partners (DAP)
 - Allegedly paid \$5M in bribes to a senior official at the Venezuelan state-owned bank
 - Discovered from SEC's periodic examination of DAP
 - Trends:
 - Use of intermediaries
 - State-owned entity
 - Financial services industry

Recent Enforcement: US Individuals

- ***SEC v. Jackson, et al.*** (pending)
 - Mark Jackson and James Ruehlen
 - Alleged bribes to customs officials in Nigeria
 - July trial scheduled for April 2014
- ***US v. Cruz, et al.*** (Haiti Teleco case, pending)
 - Grandison: pre-trial diversion
 - Cruz and Zurita: fugitives, no trial date set
 - Esquenazi and Rodriguez: in appeal

Recent Enforcement: US Individuals

- ***U.S. v. Cruz, et al.***: Appeals
 - Defendants Esquenazi and Rodriguez
 - Case history:
 - Aug 2011: convicted in jury trial
 - Oct 2011: sentenced to 15 and 7 years, respectively
 - May 2012: filed appeals to 11th Circuit
 - Main issue: what constitutes an “instrumentality” of a foreign government under the FCPA?
 - Defendant Duperval

Recent Enforcement: US Individuals

- Sentenced
 - Clayton Lewis: Bourke/Omega, time served
 - Thomas Farrell: Bourke/Omega, time served
 - Richard Morlok: CCI, 3 mos home confinement, 3 yrs probation
 - Paul Novak: Willbros, 15 mos prison, \$1M fine, 2 yrs supervised release

Recent Enforcement: US Individuals

- Sentenced
 - **Neal Uhl:** Bizjet, 8 mos home confinement, \$10K in fines, 60 mos probation
 - **Peter DuBois:** Bizjet, 8 mos home confinement, \$61K in fines, \$99K in forfeiture, 60 mos probation

Recent Enforcement: US Individuals

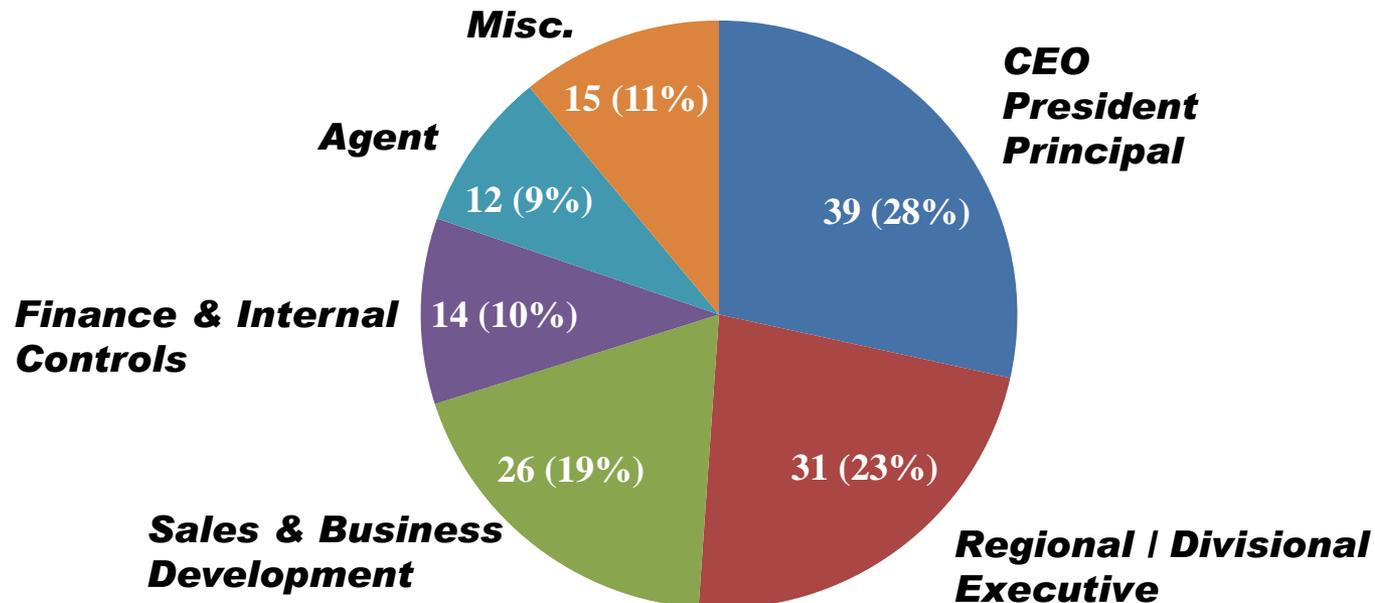
- ***U.S. v. Kozeny, et al.*** – Bourke Appeal (resolved)
 - Case history:
 - 1997-1998: involved in bribe scheme related to Azeri privatization deal
 - 2005: indictment unsealed
 - 2009: conviction; sentenced to 1 year, 1 day
 - 2010: appealed to Second Circuit
 - 2013: rehearing en banc and petition for cert denied
 - On May 17, reported to minimum security prison

Identification of FCPA Risks and Strategies to Minimize Risks

Individual Liability: Positions of Individuals Prosecuted

Positions of individuals prosecuted by DOJ or SEC

2007 Through May 31, 2013 (approx. 137 total)



Note: Updated through May 30, 2013. Includes currently pending prosecutions and all prosecutions resolved in 2007 and later, including those that did not end in a finding of guilt or culpability and those that were brought before 2007. Two of the agents were attorneys.

Anticipating and Reacting to Corruption Risk

- Know and follow your company's FCPA/Anti-Corruption policies and procedures
 - Ensure that all of your direct reports and third parties know your company's FCPA/Anti-Corruption policies and procedures
- Understand the operation of your company's compliance program
 - Ensure that all of your direct reports and third parties know how your company's compliance program works

Anticipating and Reacting to Corruption Risk

(cont'd)

- Escalate ambiguous circumstances to legal/compliance
- React to information quickly and decisively
 - Act to prevent or halt any conduct that may violate policy or the law
 - Notify the right legal/compliance personnel

FCPA Risks for Legal and Compliance Departments and Board Members

- Legal and Compliance functions and members of Board are responsible for handling corruption and compliance issues
- If gate-keepers fail to properly respond to such issues, it can subject companies/individuals to potential FCPA liability
 - Where a violation has already occurred, missteps can exacerbate the companies liability
 - Legal and compliance personnel and members of the Board could be seen as “control persons,” subjecting them to additional liability under the FCPA

Legal, Compliance, and Board FCPA Risks

- For example, legal and compliance personnel could create or exacerbate liability by:
 - Approving an improper request;
 - Failing to implement adequate compliance controls or procedures (*e.g.*, failing to adequately vet a high-risk third party agent); or
 - Failing to properly respond to or investigate red flags or compliance issues that have been elevated
- Potential exposure to companies extends beyond agency enforcement to civil litigation, including shareholder derivative, employment and anti-competition lawsuits

Legal, Compliance, and Board Evaluating Risk

- Legal and compliance personnel and Board members must be knowledgeable about how FCPA risks are being addressed
- In evaluating FCPA risk, fundamentals are:
 - What does company do/sell (*e.g.*, level of regulatory involvement)?
 - Where are services performed/products sold (*e.g.*, high-risk market)?
 - To whom are they provided/sold (*e.g.*, government, private customers)?
 - How are they provided/sold (*e.g.*, direct sales, through third parties)?
- Must tailor compliance programs to address these risks, such as:
 - Redistributing resources to adequately cover higher-risk jurisdictions;
 - Putting in place adequate third-party procedures; and
 - Implementing additional controls on higher risk activities/expenditures

Legal, Compliance, and Board Strategies to Minimize Risk

- Communicate compliance expectations; set tone from top
 - CCO should meet with Board at least annually to discuss compliance
- Periodically test effectiveness of company's compliance program and procedures
 - Embedded processes to test program is likely to promptly detect any gaps/weaknesses
- Stay abreast of FCPA/compliance developments and receive periodic anti-corruption/compliance training
- Conduct thorough anti-corruption due diligence in connection with any merger/acquisition

Legal, Compliance, and Board Strategies to Minimize Risk

- Maintain hotline and other means for reporting issues and seeking guidance without fear of retaliation
- Put in place investigation procedures for handling compliance-related incidents and reports to ensure anti-corruption issues are properly handled, including
 - Preservation of relevant evidence;
 - Immediate stop to any misconduct;
 - Implementation of interim controls (as necessary);
 - Investigation of allegations, with steps and findings documented and outside counsel consulted (as appropriate); and
 - Appropriate remediation

Financial Services Cases

- *U.S. v. Kozeny, et al./In re Omega Advisors*
- SEC sovereign wealth funds investigation
- *U.S. v. Peterson/Morgan Stanley*
- *U.S. v. Clarke, et al./Direct Access Partners*

Financial Services Industry

- Private equity and hedge funds
 - Risks in raising money
 - Risks in making investments
 - Risks in foreign offices and operations
- Fund managers, brokers, and traders
 - Risks in selling services
 - Transaction risks

FCPA Risks for Funds

- Risks in raising money
 - Foreign government investment
 - Foreign officials as clients
 - Placement agents and other third-party marketers and intermediaries
 - Gifts, travel, hospitality

FCPA Risks for Funds

- Risks in making investments
 - Portfolio companies
 - Overseas investments
 - Privatization deals
 - Joint ventures with SOEs

FCPA Risks for Funds

- Risks in foreign offices and operations
 - Obtaining licenses and permits
 - Regulatory inspections and audits
 - Foreign tax issues

FCPA Risks for Fund Managers

- Soliciting foreign investment
- Making foreign investments
- Working with agents and intermediaries
- Sitting on Boards of portfolio companies

FCPA Risks for Brokers and Traders

- Brokers
 - Foreign government entities as clients
 - Foreign officials as clients
 - Gifts, travel, hospitality
 - Obtaining licenses and permits
- Traders
 - Access to information

Strategies to Minimize FCPA Risk

- Fund level
 - Tone at the top
 - Written policies and procedures
 - FCPA compliance officer
 - Risk-based approach
 - Training and certifications

Strategies to Minimize FCPA Risk

- Fund level
 - Third party due diligence
 - Anti-corruption clauses in agreements
 - Incentives and discipline
 - Confidential reporting, internal investigation mechanism
 - Periodic testing and review

Strategies to Minimize FCPA Risk

- Fund manager/broker/trader level
 - Understand policies and procedures
 - Training
 - Know your customer, business associates
 - Conduct due diligence
 - Respond to red flags
 - Accurately report/record payments

Contact Information

Lara Covington	James T. Parkinson	James G. Tillen
<p>Special Counsel Schulte Roth & Zabel LLP +1 202.729.7485 lara.covington@srz.com</p>	<p>Partner BuckleySandler LLP +1 202.349.7955 jparkinson@bucklesandler.com</p>	<p>Member Miller & Chevalier +1 202.626.6068 jtillen@milchev.com</p>