

Top FCPA Investigations of 2010, Part I

Last week, we reviewed our Top 10 Enforcement actions of 2010. In the next two posts we will review our Top 10 investigations of 2010. While enforcement actions can provide the some of the DOJ/SEC most current thinking on FCPA compliance *best practices* the public information made available during investigations can provide to the FCPA, Bribery Act or other compliance professional many opportunities for teaching points and lessons learned by others. So with the opportunity for many educational occasions in mind we present our favorite investigations of 2010, Part I.

1. Avon-What is the cost of non-compliance?

As noted by the FCPA Professor, one of the significant pieces of information to come out of the Avon matter is the reported costs as reported in the 2009 Annual Report the following costs have been incurred and are anticipated to be incurred in 2010:

<i>Investigate Cost, Revenue or Earnings Loss</i>	
Investigative Cost (2009)	\$35 Million
Investigative Cost (anticipated-2010)	\$95 Million
Drop in Q1 Earnings	\$74.8 Million
Loss in Revenue from China Operations	\$10 Million
Total	\$214.8 Million

2. Gun Sting Case-Organized Crime Fighting Techniques Come to FCPA Enforcement

On January 18, 2010, on the floor of the largest annual national gun industry trade show in Las Vegas, 21 people from military and law-enforcement supply companies were arrested, with an additional defendant being later arrested in Miami. The breadth and scope was unprecedented. Assistant Attorney General for the Criminal Division of the US Department of Justice (DOJ), Lanny Breuer, who led the arrest team, described the undercover operation as a “two-and-a-half-year operation”. The arrests represented the largest single investigation and prosecution against individuals in the history of the DOJ’s enforcement of the FCPA.

As explained in the indictments, one FBI special agent posed "as a representative of the Minister of Defense of a country in Africa (Country A), [later identified as Gabon] and another FBI special agent posed "as a procurement officer for Country A's Ministry of Defense who purportedly reported directly to the Minister of Defense". Undercover criminal enforcement techniques such as wire taps, video tapes of the defendants and a cooperating defendant were all used in the lengthy enforcement action. In a later indictment, and seemingly unrelated to the “Africa” part of this undercover sting operation, allegations were included that corrupt payments were made to the Republic of Georgia to induce its government to purchase arms.

3. HP-Questions, Questions and More Questions

How does one begin to discuss HP's compliance year? From FCPA to Mark Hurd's very public departure for (alleged) sexual harassment to the recent announcement, reported in the WSJ, that the SEC is investigating Hurd in, 'a broad inquiry that includes an examination of a claim the former chief executive officer shared inside information.'" However we will focus on the FCPA matter which involves the alleged payment of an approximately \$10.9 bribe to obtain a \$47.3 million computer hardware contract with the Moscow Prosecutor's Office.

In an April 15, 2010, WSJ article, Mr. Dieter Brunner, a bookkeeper who is a witness in the probe, said in an interview that he was surprised when, as a temporary employee of HP, he first saw an invoice from an agent in 2004. "It didn't make sense," because there was no apparent reason for HP to pay such big sums to accounts controlled by small-businesses such as ProSoft Krippner, Mr. Brunner said. Mr. Brunner then proceeded to say he processed the transactions anyway because he was the most junior employee handling the file, "I assumed the deal was OK, because senior officials also signed off on the paperwork".

Why didn't HP self report?

The WSJ article reported that by December 2009, German authorities traced funds to accounts in Delaware and Britain. In early 2010, German prosecutors filed a round of legal-assistance requests in Wyoming, New Zealand and the British Virgin Islands, hoping to trace the flow of funds to new sets of accounts. Further, HP knew of the German investigation by at least December 2009, when police in Germany and Switzerland presented search warrants detailing allegations against 10 suspects. The New York Times, in an article dated April 16, 2010, reported that three former HP employees were arrested back in December 2009 by German prosecutors. Although it was unclear from the WSJ article as to the time frame, HP had retained counsel work with prosecutors in their investigation. Apparently, since the SEC only announced it had joined the German and Russian investigation last week, HP had not self-disclosed the investigation or its allegations to the DOJ or SEC.

Where were the SEC and DOJ?

On April 16, 2010, the FCPA Professor wondered in his blog if it was merely coincidence that a few weeks ago the US concluded a Foreign Corrupt Practices Act (FCPA) enforcement action against the Daimler Corporation, an unrelated German company, for bribery and corruption in Russia and now it is German and Russian authorities investigating a US company for such improper conduct in Russia. The Professor put forward the following query: is such an investigation "Tit for tat or merely a coincidence?" And much like Socrates, he answered his own question with the musing "likely the later". The WSJ LawBlog noted in its entry of April 16, 2010, that it would be somewhat unusual for the DOJ or SEC to stand by and watch European regulators conduct a sizable bribery investigation of a high-profile US company; phrasing it as "It's like asking a child to stand still after a piñata's been smashed open".

In September, the WSJ reported that the HP bribery probe has widened and HP, itself, has announced that investigators have “now expanded their investigations beyond that particular transaction.” This original investigation pertained to an investigation of allegations that HP, through a German subsidiary, paid bribes to certain Russian officials to secure a contract to deliver hardware into Russia. The contract was estimated to be worth approximately \$44.5 million and the alleged bribes paid were approximately \$10.9 million. In a later 10-Q filing, HP stated that the investigation has now expanded into transactions “in Russia and in the Commonwealth of Independent States sub region dating back to 2000.” The WSJ noted that US public companies, such as HP, are only required to report FCPA investigations in SEC filings if they “are material for investors.”

4. Team Inc.- no *de minimis* exception in FCPA.

As reported by the FCPA Professor, in August 2009, Team disclosed that an internal investigation conducted by FCPA counsel "found evidence suggesting that payments, which may violate the Foreign Corrupt Practices Act (FCPA), were made to employees of foreign government owned enterprises." The release further noted that "[b]ased upon the evidence obtained to date, we believe that the total of these improper payments over the past five years did not exceed \$50,000. The total annual revenues from the impacted Trinidad branch represent approximately one-half of one percent of our annual consolidated revenues. Team voluntarily disclosed information relating to the initial allegations, the investigation and the initial findings to the U.S. Department of Justice and to the Securities and Exchange Commission, and we will cooperate with the DOJ and SEC in connection with their review of this matter."

There is no *de minimis* exception found in the FCPA there are books and records and internal control provisions applicable to issuers like Team. Thus, even if the payments were not material in terms of the company's overall financial condition, there still could be FCPA books and records and internal control exposure if they were misrecorded in the company's books and records or made in the absence of any internal controls.

In its 8K, filed on January 8, 2010, Team reported "As previously reported, the Audit Committee is conducting an independent investigation regarding possible violations of the Foreign Corrupt Practices Act ("FCPA") in cooperation with the U.S. Department of Justice and the Securities and Exchange Commission. While the investigation is ongoing, management continues to believe that any possible violations of the FCPA are limited in size and scope. The investigation is now expected to be completed during the first calendar quarter of 2010. The total professional costs associated with the investigation are now projected to be about \$3.0 million."

So the FCPA Professor posed the question:

“A \$3 million dollar internal investigation concerning non-material payments made by a branch office that represents less than one-half of one percent of the company's annual consolidated revenues?”

And his answer: **“Wow!”**

In August, 2010, when disclosing its interim financial results for this year, Team reported, "The results of the FCPA investigation were communicated to the SEC and Department of Justice in May 2010 and the Company is awaiting their response. The results of the independent investigation support management's belief that any possible violations of the FCPA were limited in size and scope. The total professional costs associated with the investigation were approximately \$3.2 million."

So \$50,000 in (possibly) illegal payments equate to over \$6 million investigative costs, so far.

5. ALSTOM-Arrests in the Board Room.

As reported by the FCPA Blog, the UK Serious Fraud Office reported in dramatic fashion the arrest of three top executives of French industrial giant ALSTOM 's British unit. The three ALSTOM Board members were suspected of paying bribes overseas to win contracts. The SFO Press Release stated that "[t]hree members of the Board of ALSTOM in the UK have been arrested on suspicion of bribery and corruption, conspiracy to pay bribes, money laundering and false accounting, and have been taken to police stations to be interviewed by the Serious Fraud Office."

According to the release, search warrants were executed at five ALSTOM businesses premises and four residential addresses. The operation, involving "109 SFO staff and 44 police officers" is code-named "Operation Ruthenium" and centers on "suspected payment of bribes by companies within the ALSTOM group in the U.K." According to the release, "[i]t is suspected that bribes have been paid in order to win contracts overseas."

ALSTOM released a statement which said:

Several Alstom offices in the United Kingdom have been raided on Wednesday 24 March by police officers and some of its local managers are being questioned. The police apparently executed search warrants upon the request of the Swiss Federal justice. Alstom has been investigated by the Swiss justice for more than 3 years on the motive of alleged bribery issues. Within this frame, Alstom's offices in Switzerland and France have already been searched in the past years. Alstom is cooperating with the British authorities.

While not an FCPA investigation, this is one of the first cases where arrests were made of Board members. With the April 1 implementation date for the UK Bribery Act, we would anticipate a much more robust and aggressive enforcement by the UK SFO.

We are indebted to our fellow bloggers, the FCPA Blog and the FCPA Professor for providing up to date and excellent reviews of many of the Top 10 investigations of 2010. If you did not review their sites daily in 2010, you should do so in 2011.

A shorter version of this post appeared December 27, 2010 in the FCPA Blog.

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