

Take Us Up to Warp Speed Mr. Sulu: News Corp, James Murdoch and the FCPA

For those of us science fiction fans who grew up in the 60s, Star Trek was the premier TV show. If you wanted to go somewhere fast, warp speed was about the fastest way anyone knew how to travel. This was at least augmented, but certainly not replaced, in the 70s in Star Wars by going to hyperspace in the Millennium Falcon. I raise all this by way of introduction to the near light speed catapulting from Friday until today of the possible Foreign Corrupt Practices Act (FCPA) issues against News Corp and James Murdoch in conjunction with the claims that (the now former) United Kingdom (UK) newspaper News of the World is alleged to have paid bribes to persons in the police force in the UK.

In a story, initially reported in The Guardian on Friday by reporter Dominic Rushe, raised the question of whether James Murdoch or News Corp. could face charges under the FCPA for payments made to the UK police officers for information on stories. Rushe quoted the FCPA Professor, Mike Koehler, to confirm that FCPA jurisdiction would exist based on two factors; first for News Corp, as it is a US corporation, and “second, perhaps more importantly, the act requires that payments to government officials need to be in the furtherance of 'obtaining or retaining' business. If money is being paid to officials, in this case the police, in order to get information to write sensational stories to sell newspapers” this would also be the basis for jurisdiction.

Later that day, Sam Rubinfeld, writing in the Wall Street Journal (WSJ), also discussed the possibility of FCPA allegations against News Corp. Rubinfeld quoted James Tillen, the coordinator of Miller Chevalier's FCPA & International Anti-Corruption Group, about another facet of the FCPA, the books and records provisions. Tillen said, “It would be more likely that News Corp. could get caught up by the law's books-and-records provisions, which have a longer extraterritorial reach than do the FCPA's anti-bribery sections. For example, if the alleged payments to police were not properly recorded, that would be a violation of the FCPA”.

On Saturday, July 9, Peter Cohan, writing in Forbes.com, raised the issue of corporate governance at News Corp. He wrote, if evidence surfaces that connect James Murdoch to the any of the illegal payments directly, then he could be on the hook, for FCPA violations. Cohan also speculated that emails detailing some of the transactions at issue may have been destroyed when he stated, “News Corp. has allegedly been involved in destroying documents”.

By the next day, Sunday, July 10, the story had spread into other newspapers which went in yet another direction, that being the exposure of James Murdoch. As reported by Christopher Hope, Katherine Rushton and Raf Sanchez, The Telegraph and Robert Peston, in the BBC-mobile edition, raised the issue of whether James Murdoch authorized payments to persons whose cell phones had been hacked, “could leave him vulnerable to prosecution under anti-snooping legislation. Alan Johnson MP, the Labour home secretary from June 2009 to May 2010,

suggested that Mr. Murdoch could be charged under the Regulation of Investigative Powers Act 2000, which covers the “criminal liability of directors”.

The speed of all of the above is simply amazing. If you are on the Board of Directors of the parent entity of News Corp., you may not have even had time to retain FCPA counsel before all of this has been in the press. If you haven't I suggest you consult Howard Sklar's blog, entitled “**Getting Advice**” on who to hire when it's really, really, really bad” (as in now for News Corp):

I'd call in one of the “deans” of the FCPA bar: Dan Newcomb (Shearman), Roger Witten (WilmerHale), Homer Moyer (Miller Chevalier), Marty Weinstein (Willkie), Joe Warin (Gibson Dunn), someone like that. They're expensive, but you're going to need them...If you're in a situation and want to know what the DOJ's reaction is going to be, there is really only one person to call. And if you have to ask me who, you're in over your head. (It's Mark Mendelsohn at Paul Weiss).

The reality is that it is really bad now already and it's time for the best FCPA counsel you can find. On the other hand, it may be time to invoke another classic line from Star Trek, *beam me up, Scotty...*

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