

What Steps Can Lead to a Reduction in a FCPA Fine?

Earlier this month, in the FCPA Blog, Bruce Hinchey discussed his upcoming publication, *"Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements,"* which analyzes differences between bribes paid and penalties levied against companies that do and do not self-disclose under the Foreign Corrupt Practices Act (FCPA). Using a regression analysis, Hinchey concluded that those companies which did voluntarily self-disclose paid higher fines than companies which did not self-disclose their FCPA violations to the DOJ. He concluded his post by noting that this evidence was contrary to the conventional wisdom that a company receives a benefit from self-disclosure and such evidence would "raise questions about whether current FCPA enforcement is fundamentally fair".

We were intrigued by this paper, as were many other commentators. However, as Hinchey's analysis was limited to simply reviewing the issue of self-disclosure or not and the fine-to-bribe ratio companies pay for FCPA violations, we wondered if there were other factors which the Department of Justice (DOJ) might take into account when assessing a fine and if so, what some of these factors might be?

On Wednesday of this week, the FCPA Professor answered this question, in part, in a post on the FCPA enforcement actions against US companies - Alliance One International, Inc. and Universal Corporation, discussing the factors the DOJ took into account when calculating the fines and penalties for both companies. We are thankful to the FCPA Professor for not only reading the near 300 pages released by the DOJ and Securities and Exchange Commission (SEC) but synthesizing them down to a manageable and coherent length for his post. As reported by the FCPA Professor, within the documents were the specific remedial steps taken by both companies during the pendency of their respective investigation. The remedial steps listed helped to yield significant reductions of the fines for the FCPA violations. We will review the remedial steps taken by these two companies and hope to further condense some key lessons learned from these enforcement actions.

I. THE COMPANIES AND THEIR FCPA VIOLATIONS

The companies involved in the investigations were the US companies, Alliance One and Universal Corporation. They are both in the tobacco merchant business. Alliance One's liability was predicated on successor liability for the FCPA transgressions of an entity it purchased. Both companies made improper cash payments, gifts and bribes in Central Asia and the Far East. The companies signed Non Prosecution Agreements and there were criminal pleas by individuals involved in the criminal activity. It is significant to note that both companies self-reported to the DOJ.

II. CREDIT RECEIVED FOR COOPERATION

Both companies received substantial reductions in fines assessed for their conduct. The penalty box score is as follows:

Company	Range Fine Suggested Per	Final Agreed Fine
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	US Sentencing Guidelines	
Alliance One	\$4.2 to \$8.4MM	\$5.25MM
Universal Corp	\$6.3 to \$12.6MM	\$4.4MM

III. WHAT STEPS DID THE COMPANIES TAKE?

1. Alliance

A. With the DOJ

1. The Company's cooperation was both timely and thorough.
2. During the course of the government's investigation, Alliance and its outside counsel fully cooperated in good faith with the Department, and produced thousands of pages of documents and financial records.
3. Alliance terminated or sought resignations from all employees who were found to have knowledge of or participated in the improper payments.
4. Alliance voluntarily produced memoranda of employee interviews conducted by counsel. Alliance and their counsel have been available to meet with Department attorneys to brief them on the progress and findings of their internal investigation.

B. Remedial Steps Taken

1. Alliance took remedial actions including enhancement of its corporate compliance program.
2. Replacement of responsible management.
3. Discipline or termination of wrongdoers.

C. Audit Committee

1. Directed management to deliver a "clear and proactive message" that:
 - a. Illegal acts will not be tolerated.
 - b. Any potentially illegal act should be brought to the attention of the General Counsel prior to execution of the transaction.
 - c. Any individual that believes that an illegal act may have occurred should contact the General Counsel immediately.
 - d. Implemented a new policy requiring Chief Financial Officer or Controller pre-approval of any material payment in cash.

D. Management

1. Issued a directive to regional executives and all accounting personnel that any questionable expenses or payments and expenses without adequate explanation or documentation must be reported to the Corporate Compliance Officer.
2. Issued a direction to employees that no payments to public officials or political parties are to be made in any form without the express advance approval of the Corporate Compliance Officer.
3. Responsible personnel, including senior management in Europe and Kyrgyzstan were terminated or left company voluntarily. Other employees were reprimanded.

E. Chief Compliance Officer

1. Required all personnel to re-take an online training course covering the FCPA provided by Integrity Interactive.

F. Corporate Accounting

1. Required supporting information for all payments made in cash from any entity where such payments exceed \$2500 annually.
2. Issued a directive to minimize cash payments for anything other than incidental expenses.
3. Required that all cash accounts must be maintained in the company's name.
4. Required that all cash transactions be documented by receipts and signed by the recipient and they established a periodic review and approval process for all.
5. Required that all non-incidental types of expenses paid in cash to ensure payments would comply with Company policy and the law.

2. Universal

A. With the DOJ

1. Universal's cooperation was both timely and thorough.
2. Universal retained outside counsel to conduct an extensive internal investigation.
3. Universal and their counsel were consistently available to meet with Department attorneys to brief them on the progress and findings of their internal investigation.
4. Universal and its outside counsel fully cooperated in good faith with the Department and produced thousands of pages of documents and financial records and made employees available for interviews.
5. The Company terminated or reprimanded employees who were determined to have authorized and facilitated the improper payments.

B. Remedial Steps Taken

1. Universal took remedial actions including enhancement of its corporate compliance program.
2. It strengthened internal controls.
3. It implemented a rigorous compliance program.
4. The Company engaged an independent corporate monitor to conduct a comprehensive review of the Company's compliance standards and procedures and its internal controls.
5. Independent corporate monitor to prepare an initial report and two follow-up reports of the findings and make recommendations for improvements in the company's compliance programs over the three-year term.
6. The Company replaced the responsible management.

C. Management

1. Management established a Compliance Committee comprised of the Chief Financial Officer; General Counsel; Head of Internal Audit; Treasurer; Controller and the Principle Sales Director, which meets on a monthly basis to review and evaluate Universal's compliance programs and training.
2. Management established a Chief Compliance Officer who is responsible for the day-to-day operations of Universal's compliance program and Chairs the Compliance Committee.
3. Management issued a revised and updated Code of Conduct and translated the Code into fourteen (14) languages.
4. Management required sales, finance, and executive-level personnel to attend a day long in-person training session devoted to FCPA and local anti-bribery laws.
5. Management revised and enhanced its payment approval policy which now requires an 'approving officer' to review all supporting documentation for a payment and to understand the purpose of the payment prior to approval. The 'approving officer' must certify that he or she has reviewed the existing documentation and obtained an understanding of the legitimate business purpose of the payment. The policy also requires that employees investigate any questionable payments and determine that they are legal, legitimate, and appropriate prior to approving the payment.
6. Management revised and enhanced its due diligence process for agents. Initially, the Company suspended all commission payments to agents worldwide subject to legal department confirmation that each requested payment was adequately supported. Thereafter, it instituted a formal and standardized process for the assessment and approval of existing and proposed sales agents, which is coordinated by the Legal Department. As part of this policy, an officer, known as a 'Relationship Officer,' is required to complete a 'Sales Agent Due Diligence Checklist' for each prospective sales agent. This detailed checklist includes disclosure of relationships with foreign governments by owners, officers, directors and employees of the third-party agent or their family members, reference checks, and a list of potential red flags.

7. Management conducted, and has pledged to continue to conduct, compliance and/or FCPA training at every global conference held for Company employees.
8. Management terminated and reprimanded certain employees involved in the improper conduct.

D. Pre-Existing Compliance

One additional factor noted by the DOJ was that FCPA violations came to the attention of the Company pursuant to its internal compliance program. The Company was given some unspecified credit for this portion of the Company's pre-existing compliance program.

IV. KEY TAKE-AWAYS

These two matters provide to companies in the midst of FCPA enforcement actions specific steps that should be implemented during the pendency of an investigation to present to the DOJ. Initially it should be noted that full cooperation with the DOJ at all times during the investigation is absolutely mandatory. Thereafter from the Alliance One matter, the focus was on accounting procedures and control of cash payments. From the Universal case, a key driver appears to be the due diligence on each pending international transaction, and subsequent full due diligence on each international business partner. Next is the management of any international business partner after due diligence is completed and a contract executed. Lastly is the focus on the Chief Compliance Officer position, emphasizing this new position throughout the organization and training, training and more training on FCPA compliance.

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