

- ▶ SEC tends to focus FCPA investigations in industry groups
- ▶ Oil and gas is by far the most actively prosecuted sector
- ▶ As familiarity with an industry grows, enforcement cases accelerate
- ▶ 2007 was the busiest year on record, with 38 formal actions
- ▶ Freight, telecoms and entertainment likely areas of focus

By James Tillen and Matthew Reinhard

# Predicting the next target?

Companies caught violating the Foreign Corrupt Practices Act (FCPA) can be subject to harsh penalties and irreparable harm to their reputations.

During the first 20 years following its passage in 1977, enforcement of the FCPA was sporadic, with an average of just three to four cases each year. Since the late 1990s, however, the number of cases has increased dramatically, and 2007 was the most active year ever with 38 enforcement actions brought by the Department of Justice (DoJ) and the SEC.

As the number of cases has increased, patterns of enforcement have emerged. Certain industries – particularly the oil industry – are disproportionately represented in FCPA enforcement actions. Although some industries encounter official corruption more frequently, the trend also reflects the fact that investigation of one company in an industry often leads to US government scrutiny of other companies in that field.

In discussing industry-wide investigations at a recent Washington, DC bar event, Mark Mendelsohn, deputy chief of the fraud section of the DoJ's criminal division, remarked: 'I think this is an interesting phenomenon and one we will attempt to replicate because it really gets to the heart of corruption and levels the playing field.' By reading the tea leaves, it is possible to identify future trends in FCPA enforcement and pre-

dict which industries could be subject to US government investigations.

## Past industry enforcement actions

FCPA issues come to the attention of the DoJ and the SEC from a number of sources, such as whistleblowers, press accounts, voluntary disclosures, referrals from other US and foreign government agencies and civil lawsuits. In addition, the DoJ and the SEC are adept at leveraging one investigation into investigations of other companies in similar industries. Once familiar with an industry through investigation of one of its members, the DoJ and the SEC become aware

of which foreign government agencies and projects are corrupt, which schemes are employed to convey bribes in the industry, and which third parties (such as agents, sales representatives and distributors) serve as middlemen for bribes. The DoJ and the SEC can then use that knowledge to target other companies in the same industry for investigation.

Moreover, companies aware of their competitors' involvement in an FCPA investigation or enforcement action often will carry out their own internal investigations and make voluntary disclosures to the DoJ and/or the SEC to avoid harsher penalties they might incur if they wait for the government to come knocking. These actions further subject an industry to review and scrutiny.



This pattern is most obvious in the oil and oilfield services industry, which has been the subject of more FCPA enforcement actions than any other industry. More than 25 oil industry companies and executives have been subject to FCPA enforcement actions and oilfield service companies have received the largest FCPA criminal fine to date – \$26 million – and the largest combined penalty (fine plus disgorgement of profits) to date of \$44 million.

### **Building a knowledge base**

Through these cases, the government has amassed considerable knowledge regarding the oil industry's finances, strategies and business practices, which has contributed to the continued focus on the industry.

The ABB settlement in 2004 illustrates the DoJ/SEC's tendency to leverage one oil industry investigation into several others. Subsidiaries of ABB, a Switzerland-based issuer, allegedly made illicit payments of more than \$1.1 million to officials to win contracts to provide oil exploration technology in Angola, Nigeria and Kazakhstan. In July 2004, ABB and its subsidiaries resolved the SEC and DoJ investigations by agreeing to pay \$10.5 million in fines and disgorge \$5.9 million in allegedly ill-gotten earnings.

Subsequently, former ABB subsidiary Vetco International, which had been acquired by private investors, discovered other previously undisclosed payments made to Nigerian customs officials and voluntarily disclosed them to the government. The result was a February 2007 plea agreement and deferred prosecution agreement wherein Vetco admitted to making more than 370 payments totaling approximately \$2.1 million to receive preferential treatment during the customs process. Vetco entered into a plea agreement admitting FCPA violations by three of its wholly owned subsidiaries and agreed to pay combined criminal fines totaling \$26 million.

Press reports have identified Panalpina World Transport Holding, a global freight forwarder, as the middleman for Vetco's payments in Nigeria. This identification led other companies in the industry to conduct internal investigations of their use of Panalpina. At least five companies in the oil industry voluntarily disclosed to the DoJ/SEC that they are conducting inter-

## **Oilfield service companies have received the largest FCPA criminal fine to date**

nal investigations to determine if they violated the FCPA through their use of Panalpina or other customs brokers. The DoJ also launched its own investigation of Panalpina and its customers in the oil industry. SEC filings confirm that the government is investigating more than a dozen oil and oilfield services companies that used Panalpina. According to accounts reported in the general press, the DoJ suspects that, on behalf of these companies, Panalpina made illegal payments to customs officials in Nigeria, Saudi Arabia, Kazakhstan and other countries to expedite shipments. Thus the ABB resolution has led to the Vetco resolution (the largest criminal fine to date), five voluntary disclosures by oil industry companies and the DoJ-initiated review of other oil industry companies.

### **Predicting the next target**

The lessons learned from the oil industry enforcement actions suggest other industries that are ripe for US government scrutiny for FCPA violations:

#### **Customs clearance and freight forwarding**

As noted in discussion of past industry enforcement actions, the DoJ's current investigation of oil companies largely involves their use of Panalpina. Other firms involved in customs clearance are clearly susceptible to similar FCPA issues. Customs clearance in many countries features endemic corruption, usually through customs officials supplementing their income by obtaining payments from customs brokers wishing to clear their customers' goods. Depending on the circumstances, the payments might constitute illegal bribes or facilitating payments – small payments to low-level officials to secure or speed up 'routine governmental action' by those officials. This latter type of compensation is acceptable under the FCPA.

According to SEC disclosures, two of Panalpina's competitors, UPS and CNF, are currently under investigation for possible FCPA violations. The Panalpina probe could spawn even more investigations as the government continues to gather information about the company's activities. If the customs officials of Nigeria, Kazakhstan and Saudi Arabia allegedly received bribes from Panalpina, the chances are high

## **The ABB settlement illustrates the DoJ's tendency to leverage investigations**

that they also received bribes from other customs brokers and freight forwarders.

### Telecommunications

With some governments awarding monopolies worth billions of dollars, the telecommunications industry is susceptible to corruption on a massive scale. Indeed, the industry already has seen its share of FCPA cases, most significantly an action in 2005 against Titan for payments to secure a higher management fee for a telecommunications project in Benin, resulting in \$28.5 million in fines. The ever-expanding Siemens corruption scandal has shed additional light on the industry and will likely spawn investigations of Siemens' competitors.

On October 4, 2007, Siemens reached a settlement with German prosecutors in a corruption probe into hundreds of millions of euros in allegedly illicit payments by its telecoms unit. In its settlement, Siemens agreed to pay a €201 million (\$318 million) penalty as well as €179 million in additional taxes. German authorities have expanded their probe to include three other divisions (power generation, transmission and healthcare equipment) and 270 current and former employees. Siemens is also under investigation in the US, Italy, France, China, Hungary, Indonesia and Norway.

These investigations are casting light on telecommunications projects throughout the world. US and foreign prosecutors are obtaining information on Siemens' competitors in connection with this review, and this significantly increases the likelihood that other telecommunications companies will be subject to government scrutiny for FCPA violations.

### Entertainment industry

The 2005 film *Syriana*, starring George Clooney, might have been the first film to include the FCPA as a major plot point, but Hollywood is no stranger to its own brand of foreign corruption. Companies involved in filming and marketing overseas can encounter corruption in a number of situations, including securing permits and locations, hiring temporary employees and importing equipment. For example, a lawsuit surrounding the filming of *Sahara*, which came out in 2005, involved allegations of bribes totaling \$237,386 to expedite filming in Morocco. According to the law-

suit, the payments included a \$40,688 payment to stop a river improvement project while filming and \$23,250 for 'political/mayoral support.'

Until recently, however, the entertainment industry has not been subject to FCPA enforcement actions. In December 2007, Los Angeles film executive Gerald Green and his wife were arrested on a criminal complaint filed by the DoJ alleging that they had conspired to bribe a Thai government official in violation of the FCPA. According to the indictment, from 2002 to 2007, the Greens conspired to bribe the president of the Bangkok International Film Festival in exchange for

more than \$7 million in contracts for the Greens' management company. The Greens pleaded not guilty on January 22, 2007, and a trial is currently scheduled for September 16, 2008.

Now that Hollywood is on the DoJ's radar screen, additional investigations and enforcement actions are possible. With major studios increasingly filming on location in

countries that have a long history of corruption, significant potential for industry-wide FCPA issues exists.

All of this might lead you to ask: 'Is any industry safe from government scrutiny?' The simple answer is no. Although this article identifies just three industries likely to be subject to US government scrutiny for FCPA issues, none is safe from review. In recent years, the DoJ and SEC have significantly expanded their resources for investigating and prosecuting FCPA violations. The government is also benefiting from increased cooperation with foreign governments in identifying potential corruption and gathering related evidence.

As a result, companies in any industry are best served by taking preventive measures, such as FCPA compliance programs, employee training and third-party due diligence, rather than by trying to avoid the attention of the DoJ and the SEC.

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