

Forensic Data Challenges in FCPA Global Investigations

Rick Wolf

Lexakos LLC

Rick.Wolf@lexakos.com

973-324-0050

Bill Foale

Ernst & Young LLP

Bill.Foale@ey.com

(202) 327 7738

Topics Covered

- Global Fraud and Corruption Trends
- Overview of FCPA Provisions
- Challenges in identifying and preserving electronically stored information (ESI)
- Practical considerations
- Questions

The Growing Confluence of Fraud and Corruption

WHY YOUR COMPANY SHOULD BE CONCERNED

Latest Fraud Trends

2007 Study -- Kroll and Economist Intelligence Unit

- Majority of global companies are exposed to fraud
- Companies with over \$5 billion in gross revenue lost an average of more than \$20 million from fraud-related damages over the past three years
- 1 in every 10 large companies lost over \$100 million from fraud over same period
- Upward spike could suggest one of two possibilities:
 - (1) global corporate compliance programs require more internal support and funding to bolster controls, training and monitoring, or
 - (2) escalation and reporting processes in compliance programs are more efficiently identifying and reporting fraudulent activity -- not necessarily more bad actors in global companies

Transparency International's Global Corruption Perception Index (CPI)

- TI is a global coalition against corruption
- Corruption widespread in over 60 countries, where public sectors deemed “plagued”
- Record number of countries ranked by TI in 2007
 - Methodology measures overall extent of corruption (frequency/amount) in public and political sectors
 - Evaluated by non-resident business experts
 - Data and scores are reliable and demonstrable
 - Range between 10 (“highly clean”) and 0 (“highly corrupt”)
- <http://www.transparency.org>

CPI 2007 Top Ten

(lowest levels of corruption)

Rank	Country	2007 score	Confidence Range
1	Denmark	9.4 6	9.2 - 9.6
1	Finland	9.4 6	9.2 - 9.6
1	New Zealand	9.4 6	9.2 - 9.6
4	Singapore	9.3 9	9.0 - 9.5
4	Sweden	9.3 6	9.1 - 9.4
6	Iceland	9.2 6	8.3 - 9.6
7	Netherlands	9.0 6	8.8 - 9.2
7	Switzerland	9.0 6	8.8 - 9.2
9	Canada	8.7 6	8.3 - 9.1
9	Norway	8.7 6	8.0 - 9.2

CPI 2007 Notables

(highest levels of corruption)

Rank	Country	2007 score	Confidence Range
11	Australia	8.6	8.1 - 9.0
12	United Kingdom	8.4	7.9 - 8.8
17	Japan	7.5	7.1 - 8.0
20	United States	7.2	6.5 - 7.6
43	South Africa	5.1	4.9 - 5.5
72	Brazil	3.5	3.2 - 4.0
72	Mexico	3.5	3.3 - 3.8
72	China	3.5	3.0 - 4.2
72	India	3.5	3.3 - 3.7
79	Saudi Arabia	3.4	2.7 - 3.9
105	Argentina	2.9	2.6 - 3.2
131	Iran	2.5	2.0 - 3.0
143	Russia	2.3	2.1 - 2.6
162	Venezuela	2.0	1.9 - 2.1
178	Iraq	1.5	1.3 - 1.7
179	Somalia	1.4	1.1 - 1.7

Foreign Corrupt Practices Act

KEY PROVISIONS AND CONSIDERATIONS

Foreign Corrupt Practices Act – 1977

- Over 400 US companies, from all sectors of industry, admitted to have made questionable payments to high foreign officials to secure favorable treatment (aggregating over \$300 million in payments)
- Congress regarded such payments or bribes to be “unethical” and “counter to the moral expectations and values of the American public” and to create adverse competitive affects among US corporations
- '34 Act amended to prohibit corrupt use of mail or other means to bribe (directly or indirectly) foreign officials
- “Grease” or facilitating payments are not prohibited

Overview of FCPA

Two Broad Provisions of the Act:

- 1) Anti-bribery: Prohibits bribery (corrupt payments) to foreign officials to obtain or retain business
- 2) Books and records: Requires companies with securities registered under the Securities Exchange Act of 1934 to make and keep appropriate books and records and to maintain a system of adequate internal accounting controls. (These provisions are not limited to accounting for corrupt foreign payments or any other particular type of transactions.)

FCPA Overview

Criminal (Anti-bribery) Provisions

An issuer, domestic concern, or any foreign person in the US, who:

- Corruptly (indicates intent or desire wrongfully to influence the recipient)
- Pays or offers to pay anything of value to:
 - A foreign official, international organization official, political party, candidate for public office – collectively “foreign government official”
 - Any other person knowing something of value will be offered, given or promised, directly or indirectly to a foreign government official

FCPA Overview

Criminal (anti-bribery) Provisions (continued)

For the purpose of:

- Influencing official action, inaction or decision
- Inducing the foreign official to omit an act in violation of his/her lawful duty
- Inducing the foreign official to use his/her influence to affect an act of decision of the foreign government
- Securing any improper advantage

To obtain or retain business, or to direct business to any person

FCPA Overview

Civil Liability (Books and Records) Provisions

“Issuers” must make and keep books, records, and accounts that fairly reflect transactions and dispositions of assets

1. Issuers obligated to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances:
 - a. Transactions executed in accordance with management’s authorization
 - b. Transactions recorded as necessary to:
 - i. Permit preparation of financial statements in conformity with GAAP
 - ii. Maintain accountability for assets
 - c. Access to assets permitted only in accord with management’s authorization
 - d. Recorded accountability for assets is compared with existing assets at reasonable intervals and appropriate action taken with respect to differences

FCPA Liabilities and Costs

- Liability extends to those who make or offer to make an improper payment
- Liability imposed on those who approve payments
- Successor liability
- Liability due to conduct of agents
- No matter what the chance of liability, cost of investigation and risks are very high

FCPA Compliance Trends

Select Areas of Focus

- Travel & entertainment
- Commission payments (and other payments to intermediaries)
- Professional fees
- Petty cash
- Miscellaneous expenses
- Supplies expense
- Payroll

FCPA Compliance Trends

Select Areas of Focus

Travel and Entertainment

- Look closely at reimbursement for gifts and entertainment provided to customers
 - Does it comply with company policy?
 - Were necessary approvals obtained?
 - Is it reasonable?
 - Were legitimate receipts submitted?
- Identify reimbursement for travel for customers and supporting documentation

FCPA Compliance Trends

Select Areas of Focus

- Risks of using intermediaries (e.g., outside sales or manufacturing reps, distributors, partners, agents)
- When intermediaries used consider the following:
 - Was sufficient due diligence performed before entering into agreements with intermediaries?
 - Do written contracts exist (reps and warranties)?
 - Are commission payments consistent with written contracts/agreements?
 - Do written intermediary agreements contain language prohibiting bribery or other illegal activity?
 - If suspicion of improper intermediary conduct, were appropriate company managers notified and was any action taken to follow up?
 - Was there training for agents?

FCPA Compliance Trends

Select Areas of Focus

Analysis around professional fees

- Was due diligence performed?
- Is there a written agreement?
- Is the compensation reasonable?
- Was the service provided reasonable?
- Was a detailed invoice provided?

Challenges with Global Compliance and Investigations

PRESERVING AND COLLECTING ESI

Identifying Relevant ESI

- Threshold questions: (1) What is the relevant period? (2) Who are the important people?
- What types of information to search?
 - Unstructured
 - Email, IM, memos, spreadsheets
 - Structured
 - General Ledgers and balance sheets
 - Sales tracking records
 - Expense approval & reimbursement systems
 - Accounts payable systems
 - Cash disbursement
 - Petty cash records

Preserving Relevant ESI

- Global escalation process (or lack thereof)
- Points of contact to suspend routine overwrites and facilitate production
- How can data be accessed effectively?
 - Extracting information
 - Analyzing data
- Data maps and dealing with complex IT infrastructure
- Trans-border collection issues

Collecting Relevant ESI

- Collection vs. preservation
- Collection logistic issues
 - Complex technology infrastructure
 - Multiple jurisdictions
- Varied data privacy enforcement regimes
- Coordination of internal and external resources
- Documentation and compliance

Questions and Comments

Rick Wolf

Lexakos LLC

347 Mt. Pleasant Avenue

West Orange, NJ 07052

Rick.Wolf@lexakos.com

973-324-0050

Bill Foale

Ernst & Young LLP

1101 New York Avenue, N.W.

Washington, DC 20005-4213

Bill.Foale@ey.com

(202) 327 7738