

The Justice Department notched a record 16 enforcement actions last year under the Foreign Corrupt Practices Act.

# Crackdown on Foreign Bribery

■ By Peter H. Stone

**F**rom 2000 through 2003, as the financial allure of the Chinese market was growing, Lucent Technologies devised a stratagem that it hoped would curry favor with Beijing and spur business.

■ The New Jersey-based company, a spin-off from AT&T, spent millions of dollars on sightseeing and entertainment junkets in the United States for more than 300 Chinese government officials, many of whom had responsibility for buying telecommunications equipment. Billed as “presales” visits, they were supplemented in some instances by “post-sales” trips to Disneyland, the Grand Canyon, and other hot vacation spots.

■ Backlash



But by the end of 2007, Lucent's lavish entertainment spending on its Chinese guests had become an embarrassing problem. In December, the company (which merged with the French firm Alcatel in 2006) agreed to pay a \$1 million fine to the U.S. Treasury to settle allegations that it had violated the 1977 Foreign Corrupt Practices Act. Lucent also settled a related civil matter with the Securities and Exchange Commission for another \$1.5 million.

The Lucent agreement was one of a record 16 enforcement actions under the FCPA, which prohibits the bribing of foreign government officials to nail down business deals, that Justice notched last year involving cases in Asia, the Middle East, Africa, and elsewhere—twice as many as in 2006. Also last year, Justice and the SEC imposed the largest

fine ever for violations of the FCPA by one company: Texas oil-services giant Baker Hughes was hit with \$44 million in civil and criminal penalties for handing out bribes to government officials in Kazakhstan, Nigeria, Russia, and other countries to land government contracts.

■ Kenneth Kaiser



"Emerging markets are especially vulnerable to engaging in corruption. The real purpose of the [FCPA] is to level the playing field."

LIZ LANGE

Former federal prosecutors and white-collar lawyers who specialize in foreign bribery cases say that Justice's effort to curb these illegal payments marks a sea change for the department. Justice "is investigating and bringing cases involving much larger bribes and contracts than it did several years ago," says Joshua Hochberg of McKenna Long & Aldridge in Washington, a former chief of the fraud section at Justice who now represents FCPA defendants. The department has also made it an "enforcement priority" to go after extraterritorial cases against subsidiaries and foreign agents, he says.

This wave of law enforcement actions underscores a government commitment to clamp down on business deals that are pursued improperly in nations with weak legal and regulatory

systems—and especially in hot emerging markets that lack transparency but are magnets for multinational firms. The department's crackdown is also part of a broader, and burgeoning, international effort to curtail such graft.

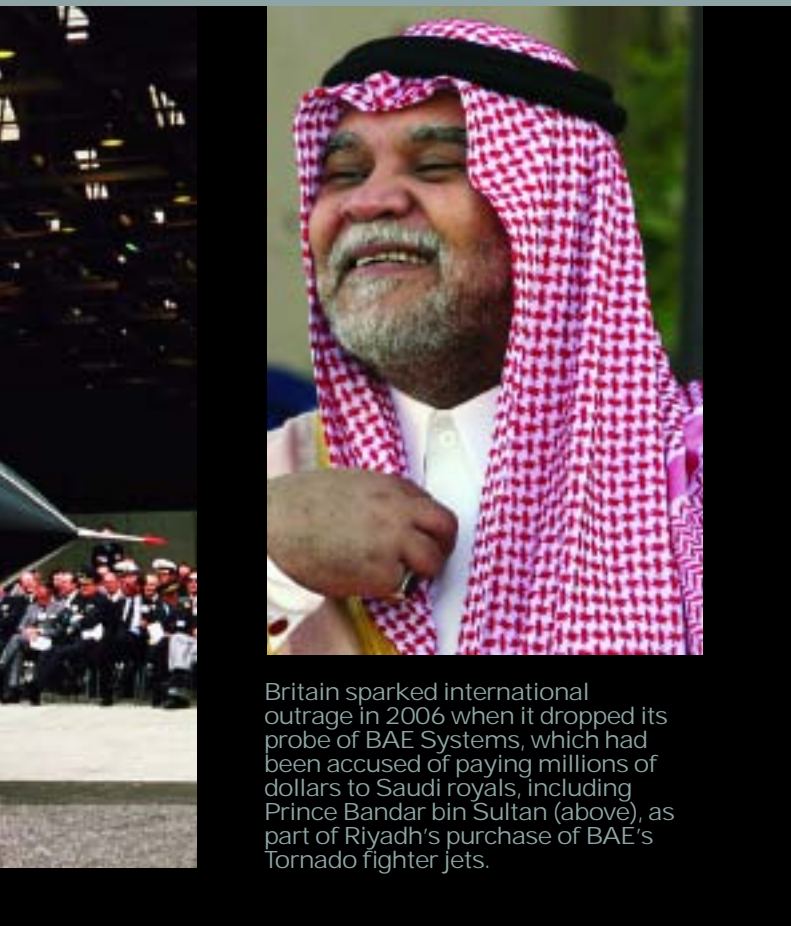
"The globalization of business is leading to the globalization of business crime enforcement," says George Terwilliger, who was deputy attorney general under President George H.W. Bush and is now a leading white-collar lawyer at the firm White & Case. In recent years, Terwilliger says, companies with potential bribery problems related to the FCPA have hired his firm to conduct internal investigations covering some 60 countries. "Both the Justice Department and the SEC," he says, "have a very strong interest in corruption cases in connection with business in China."

Currently, some five dozen probes into possible corporate bribery of foreign officials are under way at Justice and the SEC, according to lawyers familiar with the investigations. Among the multinational behemoths ensnared in the probes are British defense firm BAE Systems, German automaker DaimlerChrysler, German engineering conglomerate Siemens, and Middle East-based energy firm Halliburton.

In a current major case, federal prosecutors are examining allegations that about a dozen energy firms made illegal payoffs to Nigerian customs officials. (*See sidebar, p. 38.*)

The Foreign Corrupt Practices Act has considerable reach: It forbids all U.S. corporations and their overseas subsidiaries—as well as foreign companies that are listed on U.S. stock exchanges or do business in this country—from bribing government officials to obtain or keep business. Executives who violate the law can face stiff fines and prison time. Foreign officials are not subject to U.S. penalties for taking bribes, but such officials could face other charges if the bribe was given in the United States. Companies may also face SEC penalties for not keeping adequate books or compliance systems, and they can be forced to disgorge ill-gained profits.

Prosecutors have used incentives to prod companies to disclose bribery problems and conduct their own probes. Increasingly, Justice has agreed to more-lenient sentences—in part through deferred prosecution agreements—for companies that step up and reveal potential violations of the anti-bribery statute and set up tough internal controls.



Britain sparked international outrage in 2006 when it dropped its probe of BAE Systems, which had been accused of paying millions of dollars to Saudi royals, including Prince Bandar bin Sultan (above), as part of Riyadh's purchase of BAE's Tornado fighter jets.

PHOTOS: (L. TO R.) NEWS/COM/MIROBORNYK; PHOTOSA; MARKEX; GETTY IMAGES/PHISAN AMMAR

"The fact that the government doesn't have a knee-jerk reaction to indict companies certainly encourages them to come forward and disclose problems," says Robert Bennett, a prominent white-collar lawyer at Skadden, Arps, Slate, Meagher & Flom who is assisting Daimler with a broad internal investigation. "This is largely about reforming the way that business is done." Officials in the United States have been negotiating with Daimler to resolve allegations that the company paid bribes to obtain business in Africa, Asia, and Eastern Europe, according to a knowledgeable source.

Officials stress that bribery harms more than the individual firm that commits it. "Corruption in international business has a corrosive effect on democracy and serves to undermine and destabilize government institutions," says Mark Mendelsohn, deputy chief in the Justice Department's fraud section. Corporate bribery distorts markets, inhibits economic growth, and "impoverishes the citizens of the host country," he says.

### Help From Abroad

Justice's enforcement effort has received help from abroad. In 1997, after prodding from Washington, the 30 nations of the Organization for Economic Cooperation and Development adopted an anti-bribery convention similar to the U.S. law, and since then, several OECD nations, including Germany, have been cracking down on corrupt payments.

For instance, in late 2007 a court in Munich found Siemens guilty of paying bribes in several countries and fined the company \$284 million. That result was a far cry from the typical outcome of cases just a decade ago, when German authorities al-

lowed companies to deduct payments to government officials abroad as a business expense.

To be sure, not every member of the OECD is taking a tough approach. In a controversial move in late 2006, Britain dropped a probe into allegations that in the 1980s defense giant BAE Systems paid tens of millions of dollars to Saudi officials to win arms deals with Riyadh. Britain has yet to bring a foreign bribery case to its courts.

But overall, Justice is upbeat about the growing foreign assistance it is getting in bribery probes. "I think the OECD convention has been instrumental in a number of ways," Mendelsohn says. "We've been getting better cooperation from our foreign counterparts, which increases our ability to investigate overseas." Mendelsohn now supervises three attorneys who focus almost entirely on FCPA cases; when he started at the fraud section in early 2005, he had no lawyers under him.

The FBI also lends investigative cooperation and muscle. In late 2006, the Washington field office set up a four-person task force to focus full-time on these cases. This year, says Kenneth Kaiser, assistant director of the criminal investigative division, the bureau hopes to double the number of agents in Washington working on foreign-corruption inquiries by reallocating resources. "Emerging markets are especially vulnerable to engaging in corruption," Kaiser says. "The real purpose of the act is to level the playing field."

Some of the FBI's work has focused on cases brought against companies charged with paying millions of dollars to the former Iraqi government of Saddam Hussein to win business from the United Nations' Oil-for-Food program. One-quarter of Justice's 16 enforcement actions in 2007 dealt with illegal payments to the Iraqi dictator's government.

Despite the resources in Washington and abroad, bribery investigations can be protracted because they generally involve hidden payments and conduits. Michael Hershman, a consultant on corporate bribery issues who runs the Fairfax Group in McLean, Va., points out that bribes are typically concealed by hiring a relative of a government official; setting up a company that a government official may have an interest in; or, most often, retaining a middleman who serves as a corporate agent in dealing with foreign officials. "The role of middlemen or agents is often a key," Hershman says. "They often interface with government agencies."

Congress passed the FCPA 30 years ago after corporate abuses came to light during the Watergate scandal, but the law often was applied sparingly. For many years, U.S. corporations complained, sometimes quietly and sometimes bluntly, that the law put them at a competitive disadvantage with foreign companies that didn't face such tough curbs.

But in the late 1980s, Justice was instrumental in a 10-year drive to level the global playing field and persuade the OECD to adopt an anti-bribery convention—an effort that finally met with success in 1997. Peter Clark, a former deputy chief in the fraud section who is now with Cadwalader, Wickersham & Taft in Washington, was a key player in the arduous campaign. One year, he made 13 trips to Paris for meetings on the issue. "We spent a long time trying to get the OECD countries to agree to pass laws that mirrored the FCPA," Clark says.

### Paying Attention

In recent years, according to lawyers and federal officials involved in bribery cases, the Sarbanes-Oxley law of 2002, passed in





the wake of Enron's collapse and various accounting scandals, has made corporate executives more cognizant that they need to implement internal controls to uncover bribery schemes. "Companies are scrutinizing their internal controls more carefully in the wake of Sarbanes-Oxley," says Cheryl Scarboro, an associate director in the SEC Enforcement Division who spearheads bribery-related cases.

Defense lawyers say that Sarbanes-Oxley has forced companies to exercise tougher due diligence and oversight. "Companies are generally devoting a lot more attention to [bribery probes], and at higher levels," says Roger Witten of the law firm WilmerHale in New York City. "There's been a major shift going on to risk-aversion." And that has translated into business for white-collar lawyers who do internal probes and compliance work, and deal with federal prosecutors.

Bennett, whose firm recently helped conduct an internal probe for a company in more than 30 countries, says that companies are "doing [internal] investigations for the government. The notion of cooperation has expanded beyond all recognition in the last few years. What it means is that [federal prosecutors] expect companies to conduct their own investigations for the government's benefit and turn the results over to them."

Mendelsohn of Justice also stresses that public awareness of the issue, due in part to increased media attention, has been a boon to prosecutors. "Awareness of corruption has led to more tips and allegations coming in" from inside sources and others familiar with corporate abuses, he says. "High-level corruption remains a serious problem in many countries, while petty corruption can be a day-to-day challenge."

That helps explain the recent uptick in FCPA enforcement actions. Businesses in the defense, energy, health care, and telecommunications sectors have been nailed for violations in Kazakhstan, Nigeria, and Russia, among other places. "Justice doesn't do targeting of countries," says Clark of Cadwalader. "You go where the evidence takes you, but cases do come in clusters." One example is China. "There are a great many FCPA lawyers currently providing advice to companies doing business in China," Clark says.

Justice officials don't hide the fact that bribery of Chinese officials by companies looking to expand in China is on the radar screen. "It's fair to say that we're going to see more cases in China because it's a place where lots of public companies see business opportunities," Mendelsohn says.

Schnitzer Steel Industries of Oregon is a case in point. For several years, starting in the mid-1990s, the company authorized and paid more than \$1.8 million in bribes to Chinese officials and Chinese and South Korean company managers to help boost its sales of scrap steel. But over the past two years, the bribes have come back to haunt the company: In 2006, Schnitzer Steel entered into a deferred prosecution agreement with Justice that required the parent company to set up new internal controls, and Schnitzer's South Korean subsidiary admitted it violated the FCPA. Altogether Schnitzer earned more than \$6 million in profits from sales to customers who received illegal payments.

As part of a plea settlement, the company and its subsidiary agreed to pay \$15 million in penalties, and last year a top offi-

■ Robert Bennett



RICHARD A. BLOOM

"The government doesn't have a knee-jerk reaction to indict companies," which "encourages them to ... disclose problems."

cer of the foreign subsidiary as well as the CEO of the U.S. parent company were also forced to pay hefty fines.

Terwilliger, who represented Schnitzer and its board, points out that the company could have faced much stiffer fines if it had not cooperated. "Their legal exposure could have been four or five times as much" if they had not agreed to settle with the government, he says. Terwilliger also pointed out that "the objective for us in the defense bar is to try to resolve as many of these cases with as little fanfare as possible."

Similarly in late 2005, a China-based unit of Diagnostic Products of California pleaded guilty to paying \$1.6 million in illegal commissions to physicians and laboratory personnel who worked for government-owned hospitals in China. As part of a plea agreement, the foreign affiliate agreed to pay a criminal penalty of \$2 million, which was what the Chinese unit earned in profits from its illegal payments between 1991 and 2002. And to improve its business practices, the Chinese affiliate agreed to hire an independent compliance expert to monitor new policies that deter corruption.

### Big Guns

Two of Justice's biggest cases involve allegations that BAE made huge payoffs to members of the Saudi royalty and that Siemens paid off government officials in various countries to obtain business deals. The probes highlight how two U.S. allies, Britain and Germany, have taken sharply different stances toward investigating corporate bribery.

In the Siemens matter, U.S. prosecutors as well as German authorities and those in several other governments have been investigating a maze of suspect payments, totaling an estimated \$1.9 billion over seven years, made to government officials in dozens of countries to win contracts. Last fall's ruling by the Munich court against Siemens was a breakthrough. It found that over several years the company's telecommunications unit had paid 77 bribes to government officials in Libya, Nigeria, and Russia. The court, which focused on pay-

ments from 2001 through 2004, fined Siemens \$284 million.

To get its house in order, Siemens hired Debevoise & Plimpton in the U.S. to conduct an internal review of its global operations and Deloitte & Touche to examine its books. Siemens also hired consultant Hershman of the Fairfax Group to advise its board on establishing new compliance practices. The Justice Department and the SEC probes are continuing. "I think the Munich prosecutors have been out front on this, with DOJ and the SEC playing catch-up," Hershman says.

As part of its work, Debevoise is reportedly looking into Siemens activities in more than 60 countries. Siemens acknowledged late last year in an SEC filing that some of its officials are being investigated at units that do business in China in three areas—medical equipment, information technology, and factory automation.

In contrast to Germany's vigorous probe of Siemens, the British government dropped its inquiry into BAE Systems, and the decision has sparked enormous controversy. At issue are alle-

## ■ Where Bribery Is a 'Recognized Profession'

For decades, Nigeria has been tagged as a rough place to do business, because of widespread, entrenched corruption. But only recently has the oil-rich nation that is Africa's most populous been high on the radar screen of U.S. prosecutors pursuing corporate bribery cases overseas.

"The practice of corruption involving bribes to public officials has become a recognized profession in Nigeria," says Michael Hershman, former deputy auditor general at the U.S. Agency for International Development who is president of the Fairfax Group, which advises companies on corruption probes and related issues.

Last year, when the Justice Department charged Rep. William Jefferson, D-La., with money laundering, obstruction of justice, racketeering, and violating the Foreign Corrupt Practices Act, the 16-count indictment accused the congressman of taking and offering hundreds of thousands dollars in bribes to help business ventures in Nigeria, other African nations, and the United States. Jefferson, the first member of Congress ever charged under the FCPA, has entered a plea of not guilty. His trial is scheduled for early this year.

Specifically, Jefferson is accused of pushing for financing for a Nigerian sugar factory whose owner made payments to a Louisiana company controlled by the Jefferson family and of seeking to corrupt a prominent Nigerian politician. The indictment charged that Jefferson had a briefcase with \$100,000 (in bills marked by the FBI) that he intended as a payment to a Nigerian official whose help he was seeking.

Also last year, three subsidiaries of the British oil-services company Vetco International pleaded guilty to paying \$2.1 million in bribes over a two-year period to Nigerian customs officials. Overall, the three units agreed to pay \$26 million in criminal fines, the largest amount ever assessed in a corporate bribery case. One of the subsidiaries, VetcoGray UK Ltd., had been found guilty of violating the FCPA in 2004.

According to the plea document, the payments to Nigerian customs officials were channeled through an international freight company—later revealed to be Swiss-based Panalpina World Transport Holding—for the purpose of obtaining preferential treatment in the form of reduced tariffs and duties. The bribes were hidden by Vetco as "local processing" costs.

The Vetco case helped spur another major Justice probe into allegations that more than a dozen oil- and gas-services companies paid millions of dollars in bribes to Nigerian officials through Panalpina to get business deals. The companies under scrutiny in this inquiry include such big names in the energy field as Schlumberger and Transocean, the largest offshore oil- and gas-drilling company in the world.

Shortly after the Vetco plea, four other oil-services companies that had employed Panalpina launched their own internal probes and began talking with Justice Department officials.

Justice is also pursuing a longer-running inquiry into whether a former subsidiary of energy-services multinational Halliburton took part in paying \$180 million to Nigerian officials in the 1990s to help the company land a

lucrative contract to build a natural-gas plant in that country. The probe, which began almost four years ago, has focused on suspicious payments that were made to Nigerian officials before Vice President Cheney ran the company, during his tenure, and afterward. There is no evidence that Cheney was aware of the alleged payments.

The U.S. investigation began after France had launched its own probe into similar allegations. The contract under scrutiny by investigators involves one of the world's largest natural-gas liquefaction plants, in which then-Halliburton subsidiary Kellogg Brown & Root was one of four corporate partners. After the inquiry became public in SEC filings by Halliburton and in press reports, two top executives at KBR were let go. Halliburton, which has been cooperating with Justice and which has the law firm Baker Botts on retainer, has said it did nothing improper.

More broadly from Nigeria's perspective, recent vigorous anti-corruption efforts by Nuhu Ribadu, who was running the country's Economic and Financial Crimes Commission, stirred political opposition that led to his forced ouster this month.

In a move that provoked consternation in law enforcement circles outside Nigeria, Ribadu agreed to step aside from his post and take a government-run training course, ostensibly to help improve his performance. Pressures to remove Ribadu had been building for months but reached a new high when he arrested a Nigerian state governor and charged him with money laundering and corruption.

—P.H.S.

gations, which first surfaced in news stories in Europe, that BAE set up a slush fund of about \$110 million in the early 1980s to funnel millions of dollars to Saudi bigwigs to grease the skids for Riyadh's acquisition of BAE's Tornado fighter jets and other military hardware. Among the leading Saudis alleged to have received bribes were members of the royal family, including Prince Bandar bin Sultan, the former Saudi ambassador to Washington.

The British decision in late 2006 quickly drew criticism from OECD officials, who questioned whether political factors influenced British officials. Last March, the OECD announced that it had "serious concerns" about Britain's termination of the inquiry and questioned whether the U.K.'s actions were consistent with the OECD's anti-bribery rules. The OECD also said it planned to make an on-site visit to look into why the inquiry was dropped and, more broadly, why Britain has not pursued any charges through its legal system in recent years.

"Bribery of foreign public officials is contrary to international public policy and distorts international competitive conditions," the OECD said in a statement.

Last year, then-Prime Minister Tony Blair took responsibility for halting the inquiry, a move he defended as necessary to preserve close ties with Riyadh. Blair also noted that the inquiry's continuation would have an adverse impact on jobs.

The British action has also upset veteran FCPA lawyers in Washington. "It sends a horrible signal," says Hochberg, the McKenna Long attorney. Hershman adds: "The U.K.'s quashing of the BAE investigation has the potential to undermine the whole OECD treaty."

Critics have also pointed out that the formal British announcement on ending the probe came in late 2006 shortly after reports that the Saudis had threatened to drop plans to purchase 72 Typhoon fighter jets from BAE. About 10 months after Britain ended the probe, BAE received another lucrative order from Riyadh for Typhoon jets, which by some estimates could be worth \$60 billion in business over the length of the deal.

### Making Headway

The fact that Justice has stepped in to take the case heartens some attorneys. "DOJ has a very broad view of its jurisdiction with respect to FCPA," says Paul Berger, a partner at Debevoise & Plimpton who handled similar cases as a member of the SEC. "When foreign regulators choose not to pursue a matter, Justice will likely pursue it." According to *The New York Times*, one reason the Justice Department launched a probe this year was new information that BAE had deposited billions of dollars in payments for Bandar and other Saudis in several U.S. financial institutions, including Riggs Bank in Washington. Both BAE and the Saudis have denied doing anything illegal.

In response to the U.S. probe, BAE has hired the firm WilmerHale, and Bandar has retained two heavy hitters as his defense lawyers—former FBI Director Louis Freeh and former federal Judge and SEC Chairman Stanley Sporkin.

The BAE case isn't the only sensitive one that Justice is pursuing. In 2003, prosecutors indicted the once-high-flying New

■ Peter Clark



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York international businessman James Giffen, who in the 1990s was a confidant of and consultant to the oil-rich Kazakhstan government. Giffen was charged with funneling \$78 million in illegal payments from U.S. oil companies to high-level Kazakh officials, including Nursultan Nazarbayev, the country's strongman president who is an unindicted co-conspirator in the case, and the country's oil minister.

Investigators believe that the money from the oil companies was used to influence business deals with the Kazakhs. Giffen, who was arrested in 2003, is expected to stand trial in New York this year, although the case has already been postponed a few times, in part because of the unusual twist from the defense side.

Giffen's defense reportedly rests heavily on the contention that besides being a close adviser to Nazarbayev, Giffen was an operative for the CIA. The case is also one that has been a headache for the Bush administration, which counts Kazakhstan as an ally in the war on terrorism and a country whose oil riches make it influential in Washington. For instance, notwithstanding the gravity of the charges, Nazarbayev visited with President Bush in the White House in September 2006 and joined Bush's father in Maine for a boating excursion.

Mendelsohn and his three deputies at Justice believe that after years of facing many obstacles to bringing cases, federal prosecutors have made real headway in the past few years with greater OECD cooperation, more FBI resources, and help from companies seeking leniency for self-disclosure.

Still, the dimensions of some recent probes, as well as allegations, indicate that bribery as a means to seal deals is not going away. "The Siemens case appears to reflect the institutionalization of corruption and active involvement at the highest levels of the company," says Hochberg, the former chief of Justice's fraud section. "One suspects that there are other major companies who have made a decision that to be competitive they have to pay bribes." ■

[pstone@nationaljournal.com](mailto:pstone@nationaljournal.com)