With FCPA Actions on the Rise, Search Takes Center Stage

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Contents

With FCPA Actions on the Rise, Search Takes Center Stage ................. 1
What Does This Have to Do with Search? ................................................. 2
FCPA Investigations are Not Easy .............................................................. 3
Traditional Search Doesn’t Cut It ............................................................... 3
Let the Documents Speak to You ............................................................... 4
Regulating Bribes and Corruption is Catching on Globally ....................... 7
About the Author ..................................................................................... 10
About Catalyst ........................................................................................ 10
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Corporate Counsel magazine recently issued a report that should cause multinational corporations and their counsel to pay attention: Trend Watch: Foreign Bribery Actions Doubled Last Year.

Specifically, the magazine reported that enforcement actions under the Foreign Corrupt Practices Act (“FCPA”) nearly doubled in 2010, rising to 76 (with complaints against 23 companies and 53 individuals). In 2009, the SEC and Justice Department brought 45 actions (against 12 corporations and 33 individuals). That number was a significant jump again from 2008 when the government brought 37 actions against companies and individuals.

The pace seems to be continuing as well. This month, Paul Hastings, one of the leading international firms advising on FCPA investigations, issued its first Quarterly FCPA Report for 2011 [PDF]. So far this year, it reports, enforcement continues apace, with actions brought against four companies and seven individuals, along with a blockbuster forfeiture and a number of guilty pleas and settlements. The forfeiture amounted to nearly $149 million and related to a high-profile arms contract case involving 22 indicted defendants.

Another international law firm, Herbert Smith, in an article, Developments in Anti-Bribery Legislation: The UK Bribery Act and its Impact for Japanese Companies [PDF], reported that, of the 10 all-time largest FCPA settlements, eight were achieved in 2010 and eight (together totaling over US$ 2.25 billion) were settlements with non-U.S. companies.

A lot of the recent activity seems to relate to the changing of the guard after the 2010 election. Under the Bush administration, FCPA enforcement happened but was not a priority. Under Obama and the Democrats, FCPA investigations seem to be a priority. As Assistant Attorney General Lanny A. Breuer said in a speech at a recent national FCPA conference, “We are in a new era of FCPA enforcement [and] we are here to stay.” (Also see our earlier post, DOJ's Breuer Vows Heightened FCPA Enforcement.)

Add to all that the recent enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which provides that “whistleblowers” who provide information to U.S. authorities leading to successful prosecutions under the
FCPA may be entitled personally to huge sums as a result (up to 30% of the monetary recovery). (See Fried Frank’s client memorandum, New Incentives for Foreign Corrupt Practices Act Whistleblowers: Dodd-Frank Wall Street Reform and Consumer Protection Act [PDF]).

At the least, the government had over 140 prosecutions and investigations underway in 2010, according to EthicalCorp.com. That figure is dramatically higher than previous years under prior administrations.

All you can say is watch out.

**What Does This Have to Do with Search?**

A lot actually. FCPA investigations typically involve hundreds of thousands or even millions of documents collected from all over the world. Sometimes, the investigations are initiated after the government issues a complaint. In those cases, counsel have a starting place for their investigation. The government has a good-faith obligation to set forth the basis of its complaint and that should alert counsel as to the people to interview and the subject matter for their searches.

In other cases, it doesn’t work that way. The FCPA laws impose liability on an acquiring corporation when mergers occur. That means that the buyer of another company could be held liable for bribes and other corrupt activities that occurred even before the merger. That is true even if the buyer never did anything wrong.

In that regard, it is a bit like buying a U.S. company that has plants and property. If you later determine that the property you are buying is contaminated with toxic chemicals, you may be facing expensive Superfund liability. It doesn’t matter that you didn’t release any pollutants at your company or at the new site you acquired. You’re stuck nonetheless.

Superfund’s broad environmental liability has led to a growing and lucrative practice for environmental audit companies. The same is true for the FCPA. Some of the largest law firms in the world, with the depth and geographic coverage to mount these investigations, offer specialized FCPA practices. Paul Weiss is one such firm but there are a number of others in the game.

The key difference is this: If you are doing an environmental audit, you know exactly where the property is. You can send out your teams to inspect the ground, review the chemical history of the plant, check where materials were dumped and even drill for problems. It is just a matter of money but you can certainly find problems if you are engaged to take a look.
FCPA Investigations are Not Easy

What about in an FCPA investigation? Well, the problem is a bit different. First, what kind of fraud are we looking for? Counsel can’t exactly assemble the staff and ask for a show of hands from anyone who has bribed a foreign official lately. What, nobody raised their hand? Well, bribery isn’t something you usually put on your resumé or Facebook page.

What to do? The law firms we work with often start by talking to people and collecting their documents. What can you learn about how they deal with government officials? What do the documents show? What about the expense accounts and other money transfers?

Search is a key part of the answer. Modern search engines allow you to search millions of pages in a variety of languages with the click of a mouse. But what do you search for? That’s the hard part.

Traditional Search Doesn’t Cut It

Traditional Boolean search certainly has a part to play in an FCPA case but it isn’t always the most effective method. The reason is that we don’t know exactly what we are looking for, let alone the terms that might elicit those documents. Searching for “bribe*” within 10 words of “government official” probably won’t do the trick. Searching for the names of the government officials in question (assuming you know even that) might help.

Boolean search becomes even tougher in FCPA due diligence investigations because we are trying to prove a negative—that employees in the company to be acquired were not bribing public officials. That means counsel has to comb company and employee records to determine that nothing improper is going on. A tough assignment to say the least.

This is where a non-traditional form of search can be helpful.

Think about the traditional approach to search: You ask the documents specific questions and hope they answer with helpful information. This is a bit like the games of Fish or Battleship from our childhoods. We kind of know what we are looking for and the trick is to frame queries to find out if it is there. So, we think of key term variants and try to frame our searches to find good stuff.

“Give me all your schemes to convince government officials to give us the business.” Answer: “Go Fish.” Uggh, try again.
Let the Documents Speak to You

Now consider another approach to search, one that is more effective for these kinds of cases. Instead of questioning the documents, you let the documents speak to you and tell you their secrets. While the technique is still based on search, the approach is different. It can be far more effective when you are dealing with large volumes of documents and have no clear road map to follow.

“What does he mean?” you ask. “After all, documents don’t speak, they just sit there.”

I mean this. Modern search engines collect data about documents than can help shed light on what they contain and how they relate to one another. For example, in Catalyst CR we collect statistics about the metadata contained in the documents we index. Thus, if I were looking at files obtained from a particular office or custodian, I could quickly determine a lot of helpful information about their contents—without running a search. Our Correlation Navigators feature allows you to see a wide range of information in a view that might look like this:

In this case our focus is on recipients after a search on the Enron documents. We can quickly see who is on the sending or receiving end of emails and better focus our review on those files.

Likewise, the system looks for information within the bodies of the documents and can show key concepts being discussed in the population. Here would be a view of some of the topics being discussed in a sample of the Enron population:
In this case, the words are placed in alphabetical order but sized by relevance. They can provide important clues as you try and hone in your investigation.

With Catalyst Insight, our next release of our flagship product, we are taking investigation to a whole new level. Along with the field information we can provide about people and topics, we will provide investigators with new tools to allow the documents to speak to them.
Here is a timeline view, for example:

With the timeline and the various field facets, a searcher can interact with documents and allow them to “speak” about their contents. The searcher can interact with each of the facets or drill down into the timeline to see how the communications flowed between the parties.

Investigators can use similar tools to track communications between parties, which can help guide their investigation. Here is an example from Insight:
In this case, you can click on any individual to move that person to the center of the graph. Instantly, you can see who individuals are communicating with and how often. Click on the numbers and you can look at the actual communications. As you continue your investigation, you can go back and forth among individuals and documents.

There are a number of other techniques you can employ to speak with your documents. Clustering documents around themes can help you sort through large volumes of documents and focus on those that might matter. Finding “More Like These” from a key document set can take advantage of more complex queries than most researchers can hope to create on their own. These methods let the computer do that work based on complex algorithms and let the documents speak to you and help your investigation.

There are many more techniques we could discuss for FCPA investigations but this is a start. Suffice it to say that search is at the heart of these investigations and that search is typically more complex than we learned using Lexis or Westlaw. Mathematics, analytics and visual cues are important here as we both interrogate the documents and let them speak directly to us.

**Regulating Bribes and Corruption is Catching on Globally**

If you think this issue is of importance only to U.S.-based corporations, think again. It is true that, for many years, the United States stood alone in its efforts to police international corruption. The FCPA itself has been around for 30 or so years, although enforcement efforts have stepped up only recently. Some
questioned our cheek in trying to tell people how to do business in other parts of the world.

Despite these misgivings, the idea of combating corruption is catching on globally. England recently enacted a similar law called the UK Bribery Act. It goes into effect July 1, 2011, and will impact U.S. as well as Asian companies. Recently, the U.K. Ministry of Justice published its guidance on procedures companies can put into place to protect themselves under the new act. (Also see our earlier post, Is Your Company Ready for the UK Bribery Act?)

Other European governments are following suit. In December 2010, Spain passed legislation allowing companies to be held accountable for criminal liability and making it a crime to bribe foreign officials. A DLA Piper publication provides background on this legislation.

The Asian region isn’t ignoring this issue either. Singapore has the Corrupt Practices Investigation Bureau (CPIB) which is dedicated to enforcing its Prevention of Corruption Act.

Darren Cerasi, director of I-Analysis in Singapore (one of Catalyst’s Asia Partners), reports that while the CPIB was set up primarily to prosecute government officials, its jurisdiction also extends to civilian bribery and includes the potential for both fines and jail time. Indonesia is another country that is focused on bribery and other anti-competitive acts.

Interestingly enough, China has an Anti-Bribery Law as well, which came into effect in December 2008. The Chinese Anti-Bribery law was amended in February this year to include making it an offense to bribe government officials outside of China and non-government officials too. It is expected to come into force in May.

Our China hand, Richard Kershaw, director of Catalyst Asia, says that China seems to be interested in bringing more accountability to government and its people. In August of 2008, it also passed an Anti-Monopoly Law which allows citizens to sue for monopolistic practices along with government enforcement. These laws apply to both foreign and Chinese domestic companies.

To read more about China’s laws, see:

• DLA Piper Alert: Global Anti-Bribery Law Net Tightens Its Grips [PDF].

• Antitrust & Competition Policy Blog: China’s Antimonopoly Law—One Year Down.

Japan is in the game as well. In a recent case, prosecutors in Japan got four former senior executives of a Japanese company to plead guilty to bribing a Vietnamese transport official. The guilty pleas are especially noteworthy given Japan’s historical reputation as a jurisdiction where anti-bribery enforcement has been relatively lax. (See the Baker Botts FCPA Update).

Without question, international counsel will be faced with more and more of these tricky and high-stakes investigations. Documents will be at the center stage and search will be the key to making sense of them.
About the Author

A nationally-known trial lawyer and longtime litigation partner at Holland & Hart, Mr. Tredennick was Editor-in-Chief of the multi-author books "Winning With Computers: Trial Practice in the Twenty-First Century" (ABA Press 1990, 1991). Both were ABA best sellers focusing on using computers in litigation technology. At the same time he wrote "How to Prepare for Take and Use a Deposition at Trial" (James Publishing 1990) which he and his co-author supplemented for several years thereafter. He also wrote "Lawyer's Guide to Spreadsheets" (Glasser Publishing 2000) and "Lawyer's Guide to Microsoft Excel 2007" (ABA Press 2009) and scores of articles on legal technology issues. Tredennick has spoken on legal technology topics for two decades to audiences on four of the five continents. He founded Catalyst in 2000 and is responsible for its overall direction, voice and vision.

About Catalyst

Catalyst provides secure, scalable multilingual document repositories for electronic discovery, litigation support, and other complex regulatory matters. For over a decade, corporations and their counsel have relied on Catalyst to control litigation costs and make review teams more effective. Catalyst’s systems and supporting services cover the heart of the litigation lifecycle—from processing and search to analytics, review, production, and trial.