

FCPA Powerhouse: Willkie Farr

By Jeff Overley

Law360, New York (June 07, 2013, 1:31 PM ET) -- Over the past year, Willkie Farr & Gallagher LLP has helped Tyco International Ltd. escape brutal punishment for bribing government officials abroad, and on the flip side, the Foreign Corrupt Practices Act scandal surrounding Wal-Mart Stores Inc. has laid bare the potential consequences of not heeding the firm's advice.

That record of rock-solid counsel, which earned Willkie a place among Law360's **FCPA Powerhouse Firms**, includes a common theme of going all-in with efforts to root out unethical business dealings in hopes of minimizing damage, and it was especially noticeable in both the Tyco and Wal-Mart matters.

In a former case, Willkie had the challenge of dealing with a highly diversified client whose operations touch on security, electronics, health care and more. In addition, the allegations in the case spanned nearly two dozen countries: Bosnia, China, Congo, Croatia, Egypt, India, Indonesia, Iran, Laos, Libya, Madagascar, Malaysia, Mauritania, Niger, Poland, Saudi Arabia, Serbia, Slovakia, Slovenia, Syria, Thailand, Turkey and the United Arab Emirates.

To top things off, Willkie confronted the monumental task of helping to vet more than 60,000 third parties with which Tyco worked, exposing it to FCPA liability on myriad fronts.

"It's a big job. It's not [just] a several-week job," said Martin J. Weinstein, head of Willkie's compliance and enforcement group.

The upshot was a **\$26 million settlement** accompanied by a nonprosecution agreement, and in addition to coming away with manageable bruising of its bottom line, Tyco developed a first-in-class compliance operation, Willkie says.

"Historically there had been some lapses," Weinstein said. "By the time the matter was closed ... they were a world leader."

What's more, the company was able to drill down into its far-flung operations and determine which relationships actually merited the time and money needed to ensure respect for the FCPA.

"At the end of the day, from a business perspective, you have some level of discipline as to why you are paying a third party," said Jeffrey D. Clark, a partner in Willkie's compliance practice. "You have to ask yourself, 'Is it worth the money?'"

While Tyco embraced Willkie's comprehensive response, that wasn't the case with Wal-Mart, which in 2005 rejected the firm's advice to conduct a monthslong inquiry into bribery of Mexican government officials, according to a New York Times account published last year.

A far-reaching FCPA investigation is now underway into the retailer's efforts to score building permits south of the border, and **experts say** Wal-Mart could face much greater punishment if it turns out that it swept misconduct under the rug.

A spokesman for Wal-Mart declined to comment.

Willkie's FCPA and U.K. Bribery Act team includes 10 partners and more than three dozen associates in the U.S. and Europe, and the firm says a key element of its strength comes from hiring onetime insiders, including five former U.S. Department of Justice prosecutors, two ex-attorneys of the U.S. Securities and Exchange Commission, and a former high-level prosecutor from the U.K.'s Serious Fraud Office.

A key trend for Willkie's FCPA team is the emerging threat of lawsuits brought under the Dodd-Frank Act's whistleblower section, which provides rewards of 10 to 30 percent of recoveries for those calling attention to illicit behavior.

That provision supplies abundant grist for the mill to the plaintiffs' bar, whose work is evident in increasingly professional court actions, said Robert J. Meyer, a Willkie partner.

"[A] growing number of whistleblower letters that our clients are seeing [are] sophisticated in their drafting and thorough in their allegations," Meyer said. "This likely is an outgrowth of Dodd-Frank and the new reward program that [it] enacted."

"There is a cottage industry that has started to grow up around that," Meyer added.

Just as the health care industry has witnessed a surge in qui tam suits brought under the False Claims Act, so too will multinationals now have to contend with FCPA cases emerging from within their own ranks, Clark said.

"In many ways the dynamic is the same," he said.

A number of other statutes can be implicated under the rubric of an FCPA case, and Willkie flexed its muscles on a host of legal topics during its representation of French telecom company Alcatel-Lucent SA.

In addition to securing a \$92 million settlement and a deferred prosecution agreement, Willkie **successfully defended** Alcatel against a Costa Rican state-owned utility's bid for \$18 million in restitution under the Crime Victims' Rights Act as well as allegations of common law fraud and violation of the Florida Racketeer Influenced and Corrupt Organizations Act.

The utility "tried to intervene in the criminal case and claimed they were entitled to restitution, and we effectively argued to the court that they were not entitled to victim status," Meyer said.

Sometimes, a settlement that on the surface doesn't appear to be all that great nonetheless represents a major win, Willkie says. In 2010, for example, the firm secured a **\$185 million accord** with the DOJ and the SEC to resolve allegations that Daimler AG paid millions of dollars in bribes to officials in at least 22

foreign countries to secure government contracts.

While that was an eye-popping sum, and while two subsidiaries pled guilty to FCPA violations, the parent company wasn't convicted of criminal wrongdoing.

"It was extremely valuable to be able to say that the company had never been convicted of any charges related to bribery," Weinstein said. "We were able to largely contain the damage."

While the issues vary by case, Willkie says the best bet in all instances is for clients to come clean when mistakes are made and to make sure they're not repeated in the future.

"There is no kind of one, single blueprint, but the one thing we have I think found is when we find ourselves in a circumstance where there's going to be an enforcement action," the ideal response is proactive instead of defensive, Clark said.

The goal, he said, is that "the regulator can have confidence that at the end of the day ... this is a company they're not ever going to see again."

--Additional reporting by Shannon Henson, Carolina Bolado and Max Stendahl. Editing by Andrew Park.

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