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Arab Spring creates groundswell of potential FCPA action

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The political upheaval that took place during the Arab Spring could lead to an uptick in Foreign Corrupt Practices Act (FCPA) enforcement actions against multinational companies operating across the Middle East, anti-corruption specialists told dealReporter.

“There has been plenty of FCPA action in Libya and in Egypt,” says Andrew Spalding, an FCPA specialist and a visiting assistant law professor at the ITT Chicago-Kent College of Law. “Those have been two hotspots for FCPA enforcement actions.”

Spalding agreed with the proposition that the now ousted regime of former Libyan leader Muammar Qadaffi in many ways constituted a “perfect storm” for FCPA risk, given the long-term presence of a corrupt ruling family clique coupled with an industry (oil) with a history of FCPA enforcement.

“That, plus [previous] enforcement actions...all suggest there has probably been plenty of violations that have occurred there,” he said.

Mini-sweep of financial institutions occurring

In relation to the Qadaffi regime in particular, another FCPA lawyer told this news service that the US authorities had already begun a “mini-sweep” of financial institutions relating to Libya.

Goldman Sachs (NYSE:GS) announced in August that it is the subject of an SEC investigation relating to its dealing with Libya’s sovereign wealth fund – the Libyan Investment Authority. Press reports highlighted a USD 50m payment Goldman is alleged to have made to an asset management company controlled by a son-in-law of Qadaffi.

The FCPA lawyer added that after drastic political change -- as seen in Tripoli, Tunis, Cairo and San’a – any new government would be keen to discredit the previous regime by highlighting evidence of corruption.

During the recent trial of deposed Egyptian president Hosni Mubarak and his family in Cairo, allegations of corruption relating to a natural gas deal involving

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the Israeli-Egyptian company East Mediterranean Gas (EMG) were among the charges brought by prosecutors against Mubarak's sons Gamal and Alaa. The US-listed Ampal-American Israel Corporation (NASDAQ:AMPL) is a shareholder of EMG.

"You can bet US regulators [are paying attention]," the lawyer added.

N ot the first FCPA rodeo in Middle East

In 2010, the Securities and Exchange Commission (SEC) charged the offshore drilling company Pride International and its subsidiaries with making more than USD 2m in bribes in Libya, as well as seven other countries: Venezuela, India, Mexico, Kazakhstan, Nigeria, Saudi Arabia, and the Republic of the Congo. The SEC investigation detailed a litany of illicit payments used "to extend drilling contracts, obtain the release of drilling rigs and other equipment from customs officials, reduce customs duties, extend the temporary importation status of drilling rigs, lower various tax assessments and obtain other improper benefits."

To settle the charges, the Houston-based drilling contractor paid approximately USD 56m in disgorgement to the SEC. Pride also entered into a deferred prosecution agreement with the Department of Justice (DoJ) and agreed to pay a criminal penalty of more than USD 32m. Pride was subsequently acquired by Ensco (NYSE: ESV) in 2011, with the merger agreement acknowledging that the new entity would be bound by the agreement.

Daimler (ETR:DAI) has also fallen afoul of the US authorities over its actions in Libya, Egypt and elsewhere. In 2010, the

German auto manufacturer paid criminal penalties of over USD 90m as part of a wide-ranging investigation by the DoJ into government vehicle purchases.

Libya oil players at greatest risk

As such, the various multinational companies that did business with the now ousted leaders of Tunisia, Egypt, Yemen and Libya will likely face increased FCPA scrutiny, with the latter's oil sector presenting a particularly convincing case for possible investigation. Transparency International ranked Libya 168 (out of 182) on its annual Corruption Perception Index, which evaluates perceptions of public sector corruption across the globe.

While European petroleum giants such as Eni (NYSE:E), Royal Dutch Shell (NYSE:RDS.A) Total (NYSE:TOT), and BP (NYSE:BP) all had large investments in Libya under former 'Brother Leader' Qadaffi, foreign investment in the country's energy sector was global in nature.

Hess (NYSE:HES), ConocoPhillips (NYSE:COP) and Marathon (NYSE:MRO) also returned to the north African country in 2005 after Qadaffi made peace with the international community. Following the invasion of Iraq in 2003, Qadaffi agreed to a number of deals with the international community over weapons of mass destruction and outstanding terrorism cases.

As US-listed companies, all of the above are subject to the FCPA.

Mitigating FCPA risk can be particularly difficult for multinationals as a company may have thousands of third parties that need to be assessed and cleared, according to Kenneth Kurtz, CEO at the Steele Foundation, a provider of global business investigation services. Moreover, this region poses particular risks.

"The Middle East is infested with corruption," Kurtz said.

And what comes next?

Beyond highlighting past misdeeds, the tumult in the Middle East may also have opened up some new FCPA doors.

Richard Fenning, the CEO of Control Risks, a UK-based global risk consultancy, said he believes that the uncertainty now present in countries affected by the turmoil in the Middle East could increase the risk of bribery or corruption. According to Fenning, if a government employee is uncertain about his own future, he may be more willing to accept a bribe.

Given the recent setbacks the DoJ has suffered in a FCPA sting operation involving FBI agents posing as officials from the government of Gabon, FCPA specialists such as Michael Volkov, a partner in the Washington, DC office of Mayer Brown, have urged the DoJ to focus on better cases with stronger evidence of violations.

Even with the trial in Cairo, Libya is likely to be a greater source of evidence than Egypt. Despite the departure of Mubarak, the military regime is still very much in situ. Thus it may not be in the interest of the generals currently running the country to pursue a wide-ranging investigation into corruption and make public any evidence of bribery.

The question, according to Spalding, is whether unearthing evidence of FCPA violations is a strategic priority for Libya's interim government: the Transitional National Council.

"To what extent is it in its interest to publicize FCPA violations...because there it becomes a question of what image the new regime wants to project about the business environment in Libya," Spalding said.

"Assuming the new government recognizes the need for foreign direct investment to stimulate economic growth to stabilize their economy... they are going to be very cautions to trumpet to the world that there was systemic bribery occurring from foreign bribe payers in their country at all," he said.

However, Spalding believes the DoJ is not in the posture of waiting to see what foreign agencies uncover if there is the sense bribery has occurred.

"They act independently, they do the proactive investigations...they're looking at bank accounts, they're looking for wire transfers. They're not just waiting...I think they're much more aggressive," he said.

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