

# 1st FCPA Case Under Biden Offers Compliance Reminders

By **Robert Johnston Jr.** (July 21, 2021, 5:58 PM EDT)

The first Foreign Corrupt Practices Act case under President Joe Biden's administration reinforces some well-known risks for companies subject to the FCPA — namely, increased U.S. and international enforcement and cooperation as well as the risks related to public contracting and tenders, the use of third-party agents, successor liability following merger and acquisition activity, and the U.S. authorities' aggressive assertion of jurisdiction in international corruption cases.



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## Case Summary

In 2011, Foster Wheeler AG, as it was then known, was a subsidiary of a Swiss-based and Nasdaq-traded company. Foster Wheeler sought to establish a business presence in Brazil's oil and gas industry, and a significant part of this business expansion effort focused on a bid for a contract to design a gas-to-chemicals complex for *Petróleo Brasileiro SA*, or the Petrobras Project, the Brazilian state-owned oil company.[1]

In order to win the public tender for the Petrobras Project, Foster Wheeler engaged two agents, who corruptly obtained confidential, nonpublic Petrobras documents and information in order to help Foster Wheeler win the bid.

On June 25, Amec Foster Wheeler Limited, as it is now called and currently a subsidiary of John Wood Group PLC, or Wood, a U.K.-based global engineering company, resolved a U.S. Department of Justice and U.S. Securities and Exchange Commission investigation into violations of the FCPA in Brazil by paying \$41 million in penalties and disgorgement and by entering into a three-year deferred prosecution agreement with the DOJ.[2]

The same day, the company entered into an agreement in principle with the U.K. Serious Fraud Office to enter into a separate DPA, which an English court subsequently approved, and the company agreed to pay £103 million in penalties and costs.

## Key Takeaways

### ***Increased Enforcement Activity***

This is the first FCPA enforcement action under the Biden administration, but one should expect that this will not be the last.

- In a June 2 speech, Nicholas McQuaid, the DOJ's acting assistant attorney general stated that FCPA cases are a priority and that "there is more to come in 2021." [3]
- The next day, on June 3, the Biden administration announced that combating international corruption is a "core national security interest." [4]

Accordingly, companies subject to the FCPA should expect increased scrutiny and enforcement

activity from the U.S. authorities going forward.

### ***Continued International Cooperation***

Over the past several years, cross-border, interagency law enforcement cooperation has become more common.

The underlying facts and circumstances of this case were prosecuted by regulators in three countries: the U.K. SFO, the U.S. authorities, and the Ministério Público Federal in Brazil, the Brazil Comptroller General's Office and the Brazil Solicitor General.[5]

As demonstrated by the resolution of this case, multinational corporations can be prosecuted by multiple law enforcement agencies.

In addition to Brazil, the U.K. and the U.S., cross-border anti-corruption enforcement appears to be picking up steam in 2021. For example, last month:

- The United Nations General Assembly held a special session focused on increased international cooperation to fight corruption.[6]
- The Organization for Economic Cooperation and Development urged Turkey to increase its enforcement of foreign bribery offenses.[7]

Accordingly, as multilateral international organizations, such as the OECD and U.N., continue to push anti-corruption enforcement on the world stage, multinational companies can expect that further international cooperation will increase the likelihood that corrupt conduct not only will be exposed but also investigated and punished.

### ***Access to Confidential Information***

Paying a government official to obtain confidential information in violation of that official's duty constitutes obtaining an improper advantage under the FCPA.[8]

Here, Foster Wheeler, through its third-party agents, obtained internal, confidential information related to the Petrobras Project by using a Petrobras employee, who happened to have \$200,000 in personal debts owed to one of the agents, to obtain confidential documents, inside information and secretive assistance in resolving contracting disputes in Foster Wheeler's favor during internal Petrobras meetings. The agents also paid bribes to other Petrobras officials.[9]

Including this case, there have been four FCPA enforcement actions over the past 12 months in which defendants corruptly obtained confidential information in order to win public tenders and business from state-owned enterprises.[10]

Prior to submitting a bid, companies engaged in public contracting, public tenders and public requests for proposal should vet the provenance and the legitimacy of all the data that it uses to prepare the bid — especially where the information is supplied by a third party rather than developed through its own internal and proprietary research and analysis.

### ***Third-Party Risk***

Approximately 90% of all FCPA enforcement actions involve third-party intermediaries, and this case was no different.[11] Here, the defendant used two third-party agents, including one that failed due diligence, to secure a contract from a state-owned oil company.

All companies subject to the FCPA should have processes and procedures in place to conduct due diligence and vet all third-party agents, in particular agents in high-risk countries or agents interacting with high-risk customers, such as Petrobras.

As a best practice, due diligence should be completed before the agent is engaged not after the fact as occurred in this case.

### ***Merger and Acquisition Risk***

Although a stand-alone company at the time of the misconduct, the defendant and its Brazilian subsidiary were purchased twice in the time period between the corruptly obtained public contracts in Brazil and the ultimate enforcement action.

By the time of the second acquisition in 2017, the Brazilian Federal Police's "Operation Car Wash" investigation into widespread corruption at Petrobras should have raised due diligence red flags where the target recently used third-party agents to win Petrobras contracts.

In fact, Wood apparently knew that Foster Wheeler was under investigation, but:

the SFO investigation was not factored into the valuation because it was announced after the offer was made ... Wood will ultimately pay the liabilities arising under the DPA and that it has also been put to substantial costs by dealing with the investigation and the DPA. This outlay was not caused by any fault on its part. Wood is the corporation which will carry the can for the activities detailed in the statement of facts, and it was entirely innocent of them.[12]

The case serves as a reminder that acquiring companies should conduct robust pre- and post-closing due diligence, including a post-closing audit and an expeditious compliance integration plan to be sure that they did not buy FCPA liability in addition to the target's other assets.

Moreover, acquiring companies should include contractual protections to enable themselves to abandon the deal if significant compliance issues arise between offer, deal signing and closing.

Here, Wood learned of an SFO investigation into the target's activities after offering to acquire Foster Wheeler but continued with the acquisition anyway. Years later, Wood is ultimately responsible for paying fines in three countries in order to resolve the "historical conduct in the legacy Foster Wheeler business." [13]

Wood is not the first acquiring company to have inherited regulatory exposure following a corporate acquisition. Indeed, there have been 76 FCPA enforcement actions related to merger and acquisition activity, approximately 15% of all cases.[14] As stated by Charles Cain, chief of the SEC's FCPA enforcement unit, "[t]he potential for a new market cannot be a siren's song that overwhelms good corporate governance." [15]

### ***Jurisdiction***

In this case, a Swiss-based company owned by a U.K.-based parent company engaged agents in Brazil and Italy, who bribed Brazilian officials to win a contract in Brazil.

Nevertheless, the U.S. authorities asserted jurisdiction because the defendant traded on Nasdaq at the time of the historic misconduct and because some acts in furtherance of the conspiracy occurred in the U.S., such as email correspondence using a U.S.-based email server, passing documents through a manager at a New York clothing store and the use of correspondent bank accounts in New York.

For non-U.S. persons, this is an important reminder that even minimal contacts or fleeting activities in the U.S. can trigger U.S. jurisdiction and that the U.S. authorities will assert jurisdiction in cross-border corruption cases aggressively.

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[1] See *United States v. AMEC Foster Wheeler Ltd.*, 21-cr-298 (KAM) (E.D.N.Y. June 25, 2021) (Statement of Facts at para. 17).

[2] A portion of the DOJ and SEC fines and penalties are offset by penalties paid in Brazil and the U.K. See, e.g., In the Matter of *AMEC Foster Wheeler Ltd.*, Admin. Pro. File No. 3-20373 at para. IV(B) (SEC June 25, 2021) (providing for a disgorgement offset up to \$9.1 million for disgorgement paid to Brazilian authorities and up to \$3.5 million for disgorgement paid to the U.K. SFO).

[3] Clara Hudson, "FCPA enforcement is 'in an entirely new' place, says acting criminal division chief," *Global Investigations Review* (June 2, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/fcpa/fcpa-enforcement-in-entirely-new-place-says-acting-criminal-division-chief>.

[4] See The White House, "Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest (Presidential Actions June 3, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/>.

[5] John Wood Group plc, "Wood Reaches Resolution on Legacy Investigations," Press Release (June 25, 2021), <https://www.woodplc.com/news/latest-press-releases/2021/wood-reaches-resolution-on-legacy-investigations>.

[6] See United Nations General Assembly, "United Against Corruption 2021 – Special Session of the General Assembly against Corruption 2021" (New York, NY June 2-4, 2021), <https://ungass2021.unodc.org/ungass2021/index.html>.


[7] See OECD, "Turkey should urgently implement key reforms to boost fight against foreign bribery, including to preserve independence of investigations and prosecutions (Paris, France June 29, 2021), <https://www.oecd.org/newsroom/turkey-should-urgently-implement-key-reforms-to-boost-fight-against-foreign-bribery-including-to-preserve-independence-of-investigations-and-prosecutions.htm>.

[8] See 15 U.S.C. 78dd-1 et seq. (emphasis added).

[9] See *United States v. AMEC Foster Wheeler Ltd.*, 21-cr-298 (KAM) (E.D.N.Y. June 25, 2021) (Criminal Information at paras. 35-38).

[10] See, e.g., *United States v. Vitol Inc.*, 20-cr-539 (E.D.N.Y. Dec. 3, 2020) (Criminal Information) (corruptly obtaining confidential Petrobras information relating to internal import and export forecasts to benefit Vitol in its trading with Petrobras and obtaining confidential information relating to competitors' bids in order to win public tenders); *United States v. Sargeant Marine*, 20-cr-363-ENV (E.D.N.Y. Sept. 22, 2020) (Criminal Information) (obtaining confidential information in order to win bids from the state-owned Venezuelan oil company PdVSA); In the Matter of *Alexion Pharmaceuticals*, Admin Pro. 3-19852 (SEC July 2, 2020) (paid bribes to Turkish government officials in order to secure regulatory approvals and to obtain confidential information related to the status of regulatory submissions).

[11] See, e.g., Stanford Law School Foreign Corrupt Practices Act Clearinghouse, <https://fcpa.stanford.edu/advanced-search.html>.

[12] *SFO v. Amec Foster Wheeler Energy Ltd.* , (Crown Court at Southwark July 1, 2021) (Judgment at para. 30), <https://www.sfo.gov.uk/download/amec-foster-wheeler-energy-limited-deferred-prosecution-agreement-judgment/>.

[13] John Wood Group plc, "Wood Reaches Resolution on Legacy Investigations," Press Release (June 25, 2021), <https://www.woodplc.com/news/latest-press-releases/2021/wood-reaches-resolution-on-legacy-investigations>.

[14] See, e.g., Stanford Law School Foreign Corrupt Practices Act Clearinghouse, <https://fcpa.stanford.edu/advanced-search.html>.

[15] SEC, "SEC Charges Amec Foster Wheeler Limited With FCPA Violations Related To Brazilian

Bribery Scheme," Press Release 2021-112 (June 25, 2021) <https://www.sec.gov/news/press-release/2021-112>.

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