



The
General Cable
FCPA Enforcement Action



By Thomas Fox

The General Cable FCPA Enforcement Action

By

Thomas Fox

February 2017

**To compete internationally,
you must comply internationally.**

*"A strong
compliance program
provides us a
competitive advantage"*

Lori Queisser

Executive Vice President
Chief Compliance Officer
Teva Pharmaceuticals
and Conselium client



Conselium is the only global executive search firm
that focuses solely on Compliance Officers.

www.conselium.com

PUBLISHED BY CORPORATE COMPLIANCE INSIGHTS



[Corporate Compliance Insights](#) educates and encourages informed interaction within the corporate compliance community by providing discussion and analysis of corporate compliance, risk assessment, ethics, audit and corporate governance topics. In adherence to strict journalistic standards, CCI publishes the works of GRC experts and thought leaders from around the world. CCI's founder and publisher is [Maurice Gilbert](#), CEO and managing partner of Conselium, a compliance-focused executive search firm.



Corporate Compliance Insights is the flagship publication of [Conselium Executive Search](#). Conselium is the only global executive search firm that focuses exclusively on compliance professionals.

COVER IMAGE: SHUTTERSTOCK

COVER DESIGN: [WORDS AND PICTURES MARKETING](#)

About the Author



Thomas Fox

Thomas Fox has practiced law in Houston for 25 years. He is now assisting companies with FCPA compliance, risk management and international transactions.

He was most recently the General Counsel at Drilling Controls, Inc., a worldwide oilfield manufacturing and service company. He was previously Division Counsel with Halliburton Energy Services, Inc. where he supported Halliburton's software division and its downhole division, which included the logging, directional drilling and drill bit business units.

Tom attended undergraduate school at the University of Texas, graduate school at Michigan State University and law school at the University of Michigan.

Tom writes and speaks nationally and internationally on a wide variety of topics, ranging from FCPA compliance, indemnities and other forms of risk management for a worldwide energy practice, tax issues faced by multi-national US companies, insurance coverage issues and protection of trade secrets.

Thomas Fox can be contacted via email at tfox@tfoxlaw.com or through his website www.tfoxlaw.com

The General Cable FCPA Enforcement Action

Part I: The Bribery Schemes

The Department of Justice (DOJ) and Securities and Exchange Commission (SEC) continued their stunning run of 2016 Foreign Corrupt Practices Act (FCPA) enforcement actions right up to the end of the year with the announcement of the resolution of the General Cable Corporation (General Cable) enforcement action. It was settled with the DOJ via a [Non-Prosecution Agreement](#) (NPA) and the SEC via a [Cease and Desist Order](#) (General Cable Order). There was also the resolution of a civil charge by the SEC against a former General Cable executive, Karl Zimmer, via a [Cease and Desist Order](#) (Zimmer Order).

The fines and penalties paid by General Cable were not insignificant. The company paid a \$20MM fine based upon its criminal conduct and paid another \$51MM in profit disgorgement. Finally, based upon the conduct laid out by the SEC in the General Cable Order, the company was assessed another \$6.5MM for violations of the FCPA's accounting provisions. The \$20MM figure reflects a 50% discount off the bottom of the US Sentencing Guidelines fine range, demonstrating that as bad as the underlying bribery and corruption may have been, the DOJ will give significant credit when the company meets the requirements under the FCPA Pilot Program. As Assistant Attorney General Leslie Caldwell stated in the DOJ Press Release, "General Cable paid bribes to officials in multiple countries in a scheme that involved a high-level executive of the company and resulted in profits of more than \$50 million worldwide. But General Cable also voluntarily self-disclosed this misconduct to the government, fully cooperated and remediated. This resolution demonstrates the very real upside to coming in and cooperating with federal prosecutors and investigators. It also reflects our ongoing commitment to transparency."

As for the illegal conduct, one can only say it was wide spread and pervasive throughout several business units in the organization. As stated in the NPA, "General Cable knowingly and willfully failed to implement and maintain an adequate system of internal accounting controls designed to detect and prevent corruption or otherwise illegal payments by its agents. In particular, and as relevant here, General Cable had deficient internal accounting controls that did not require and/or ensure, among other things (a) due diligence for the retention of third party agents and distributors; (b) proof that services had been rendered

by third parties before payment could be made to them; (c) oversight of the payment process to ensure that payments were made pursuant to contractual terms or that payments were reasonable and legitimate. General Cable knowingly and willfully failed to address these known weaknesses, in relevant part, to allow the conduct to continue.” The fallout from these illegal schemes were more than \$13MM in bribes paid out and \$51MM in illegal profits. The bribery schemes involved multiple countries.

A. Angola

Here General Cable’s Angolan subsidiary made illegal payments to customers who worked for state-owned enterprises. The NPA noted, “(i) between 2003 and 2009, General Cable Celcat and General Cable Condel paid more than \$450,000 directly to officials at Angolan State-Owned Enterprise 1, Angolan State-Owned Enterprise 2, and Angolan State-Owned Enterprise 3; (ii) between 2009 and 2013, General Cable Condel paid more than \$8.7 million to a sales agent in Angola with knowledge that the sales agent would, and did, pass a portion of those payments to officials at Angolan State-Owned Enterprise 1, Angolan State-Owned Enterprise 2, and Angolan State-Owned Enterprise 3; and (iii) General Cable Condel paid more than \$150,000 to another agent with knowledge that the payments would be passed on, in part., to two officials of a state-owned customer.”

These payments were well known within these business units as illegal bribes, with one employee writing in an email, “Everyone knew that [an Angolan State-Owned Enterprise 2 official] was being paid (if not there would be no need for the bills that come from there); when the contract was signed, this was what was agreed had to be paid.” These bribes paid in Angola were funneled through third-party agents. As early as 2012, the General Cable internal audit department picked up evidence of these illegal payments finding that “payments made to the third-party sales far exceeded the amounts required under the contract with the agent”. The NPA noted that the employees “knew” payments made to the agent would be passed on as bribes.

B. Bangladesh

General Cable conducted business in Bangladesh, Thailand and Indonesia

through a subsidiary, Phelps Dodge International (Thailand) Ltd. (PDTL). In Bangladesh, the company paid \$43,700 to an agent “with the understanding that the agent would use the money, in part, for corrupt purposes. General Cable was aware of red flags in connection with these payments and ultimately became aware of, or at the very least were willfully blind to, certain of the corrupt payments.” There was also evidence of specific knowledge in PDTL that payments to the agent were being “shared by decision makers in customer, concerned higher ups in Ministry and some top executives at bidder.”

C. Indonesia

In Indonesia, PDTL paid “more than \$2 million to two freight forwarders in Indonesia with the understanding-that the freight forwarders would use the money, in part, for corrupt purposes.” Once again, “General Cable was aware of red flags in connection with these payments and ultimately became aware of, or at the very least were willfully blind to, certain of the corrupt payments.” Indeed, there were emails cited which demonstrated the bribery scheme was well-known within the business unit, when an “employee wrote an e-mail describing the services of a principal of the two freight forwarders in Indonesia, stating “Mike I mention it before, my agent doesn’t ask for any money upfront. He can afford to pay his way in and out of PLN [Perusahaan Listrik Negara, the Indonesia-state-owned electricity company].””

D. Thailand

In Thailand the illegal bribe payments were made through a distributor who received excessive rebates which were then used to facilitate the corrupt payments. The NPA stated, “more than \$1.5 million in rebates to a distributor in Thailand with the understanding that the distributor would use the money, in part, for corrupt purposes in association with PDTL’s sales to state-owned customers in Thailand, including sales to: (i) the Provincial Electricity Authority, a state-owned electricity supplier in Thailand; (ii) the Metropolitan Electricity Authority, a state-owned electricity supplier in Thailand; and (iii) TOT Public Company Limited, a state-owned telecommunications company.”

All this was in the face of clear red flags being raised regarding the distributor. In one reported instance, “In or about 2011, Executive A met with a high-level

executive at General Cable with responsibility for overseeing international operations and expressed concerns that payments to the distributor in Thailand were being used for corrupt purposes. Despite this conversation, the corrupt payments did not stop, nor was an investigation conducted.” Even more troubling were the findings made during a tax review in Thailand, which noted “potential applicability of the US Foreign Corrupt Practices Act (‘FCPA’) for commissions paid to Thai governmental authorities.” Another email from a General Cable employee with responsibility for corporate taxes stated: “[s]ince this is a legal matter rather than tax, no need to do anything further for me. I will leave it up to you as to whether you want to look into any further.” General Cable took no further action and did not take any steps to implement adequate internal accounting controls. The corrupt payments made through intermediary companies in Thailand” continued.

All of this led the DOJ to note wryly in the NPA, “Thus, even if senior employees of General Cable were unaware initially that the payments to the distributor were being used for illegal purposes, employees at PDTL (Phelps Dodge) and General Cable, including Executive A, came to the understanding that money being paid to the distributor was being used for illegal purposes, and closed their eyes to it being used for bribery.”

E. China

In China the bribery scheme was once again funneled through corrupt distributors. The China business unit, “paid more than \$500,000 to China-based agents and distributors, typically in the form of rebates, special discounts, and technical service fees.” Once again, “General Cable China knew that the third-party agents and distributors would use the money, in part, for corrupt purposes.” Emails presented in the NPA noted, “The General Cable China employee emailed the supervisor and justified the corrupt payment, stating that “a few key players at [the state-owned customer] are our internal contacts and charge a certain amount of fees. If we are looking to have long-term cooperation with them, charges for this is rather inevitable.””

The various bribery schemes are summarized in the *Bribery Box Score*

Country	Bribery Scheme Employed	Amount of Corrupt Payments Made	Actual Knowledge of Scheme
Angola	Sales Agents	\$9.3MM	yes
	Sales Agent	\$34,7000	yes
Indonesia	Freight Forwarders	\$2MM	Yes
Thailand	Distributor	\$1.5MM	yes
China	Distributors	\$500,000	yes

I have laid out these bribery schemes in some detail as they continue to provide significant information to the compliance practitioner about the different ways to fund bribery schemes and how routine oversight can detect them. (Hint - follow the money.) Of course, even if you detect such illegal schemes, there must be a corporate will to stop the illegal conduct and then remediate the conduct. Apparently for some significant period of time, such was not the case at General Cable. Yet as noted early in this blog post, the company made a stunning comeback and actually received a 50% discount off the low range of the suggested penalty under the US Sentencing Guidelines. Tomorrow I will consider what the company did to obtain such a result.

Part II: The Comeback

In Part I, I laid out the bribery scheme in some detail. Next, I consider how General Cable was able to obtain such positive result in the light of multiple bribery schemes in multiple jurisdictions and corporate awareness or conscious indifference to them. Clearly the four prongs of the FCPA Pilot Program were met. As stated by Assistant Attorney General Leslie Caldwell in the DOJ Press Release announcing the enforcement action, “General Cable paid bribes to officials in multiple countries in a scheme that involved a high-level executive of the company and resulted in profits of more than \$50 million worldwide. But General Cable also voluntarily self-disclosed this misconduct to the government, fully cooperated and remediated. This resolution demonstrates the very real upside to coming in and cooperating with federal prosecutors and investigators. It also reflects our ongoing commitment to transparency.”

Reviewing each of the Pilot Program prongs separately, there was self-disclosure by General Cable. The NPA stated, “the Company received voluntary self-disclosure credit because it voluntarily and timely disclosed to the Fraud Section the conduct described in the Statement of Facts attached hereto as Attachment A (the “Statement

of Facts”).” The issue of self-disclosure is one which has bedeviled companies for quite some time. However, the General Cable enforcement action continues to demonstrate the DOJ takes this seriously and will give credit when companies do self-disclose.

In the area of significant cooperation, the NPA stated, “the Company received full credit for its cooperation with the Fraud Section’s investigation”. The parameters of this cooperation included conducting a thorough internal investigation; “making regular factual presentations and proactively providing updates to the DOJ; voluntarily making foreign based employees available for interviews in the United States; producing documents, including translations, to the DOJ from foreign countries in ways that did not implicate foreign data privacy laws; collecting, analyzing, and organizing voluminous evidence and information for the DOJ; and identifying, investigating, and disclosing conduct to the DOJ that was outside the scope of its initial voluntary self-disclosure.”

This is the first time I have seen a specific reference to production of documents in a manner which “did not implicate foreign data privacy laws”. It is not clear from this statement how the implication was avoided, whether through employee consent or having a duplicate document in a more corporate friendly country. This shows the DOJ has some sensitivity to foreign document privacy laws but there are almost always alternative methods of production.

Also note the additional information provided to the DOJ which was “outside the scope of its initial voluntary self-disclosure.” This means the DOJ will accept the results of a less than complete internal investigation if you supplement the information regularly and on a timely basis. The important point was noted to be that by the conclusion of the investigation, General Cable had provided to the DOJ all relevant facts known to the company, “including information about individuals and third parties involved in the misconduct.”

Next was in the area of remediation. The NPA is replete with the steps taken by General Cable. As laid out in the NPA they included:

- (1) Terminating the employment or accelerating the previously-planned departures and resignations of 13 employees who participated in the misconduct;

- (2) Causing the resignation of employees and accelerating the previously-planned departure of an additional employee who failed to supervise effectively others who were engaged in the misconduct described in the Statement of Facts;
- (3) Causing the resignation of an additional employee who failed to take appropriate steps in response to identifying the misconduct;
- (4) Terminating the business relationships with 47 third-party agents and distributors who participated in the misconduct described in the Statement of Facts;
- (5) Hiring a Chief Compliance Officer (CCO) who has an executive officer position in the Company and separate reporting lines to the Chief Executive Officer (CEO) and Audit Committee of the Board of Directors;
- (6) Conducting a global and enterprise-wide risk assessment and evaluation;
- (7) Developing and implementing a risk mitigation plan for risks identified through the assessment and evaluation;
- (8) Developing a comprehensive compliance program that integrates business functions into compliance leadership roles, is designed to deliver clear and consistent communications and expectations Company-wide through policies and procedures, and includes frequent leadership communications to all employees;
- (9) Revamping the ethics and compliance helpline;
- (10) Delivering tailored face-to-face compliance training, including training on the FCPA, to the Board of Directors and senior executives, Internal Audit personnel, sales leaders, and all salaried employees;
- (11) Adopting heightened controls on the selection and use of third parties, including building a system for third-party due diligence that assigns ownership to business personnel to shepherd prospective third parties through a comprehensive risk assessment, review, and approval process;
- (12) Issuing, and providing training on, business amenities policies specific to certain countries; and
- (13) Conducting on-site global compliance audits to test adherence to enhanced controls and procedures.

These remediation steps can be broken down into three general categories. First was the disciplining of the persons directly involved, those who knew or should have known and recalcitrant third parties. Next was the hiring of a CCO with real authority and power to act and get things accomplished. Finally, was the

specifics of the compliance program which was implemented.

While many of these steps have been laid out previously as a part of a *best practices* compliance program, there is one I want to highlight. It is No. 10, which specifies “Delivering ***tailored*** face-to-face compliance training, including training on the FCPA, to the Board of Directors and senior executives, Internal Audit personnel, sales leaders, and all salaried employees.” [emphasis supplied] The word ***tailored*** communicates the DOJ’s expectation for training far beyond the standard out of the box compliance training. It means you must put on training which is not only designed for the risk group it is being presented to but you must have some thought into the different risks for each discipline within an organization and their respective role in any compliance program.

Part III: The Denouement

Before I get to the lessons to be garnered, I want to briefly discuss the SEC enforcement action against Karl Zimmer (Zimmer). Per the Zimmer Order, he was a Senior Vice President of General Cable who approved improper commission payments to a third-party Agent on sales by General Cable’s Angolan subsidiary to Angolan state-owned enterprises. At the time, Zimmer knew that policies prohibited excessive commissions to third parties on sales to state-owned enterprises. For his violations, Zimmer agreed to a \$20,000 fine. The Zimmer action should stand as a stark reminder that individuals who violate the FCPA stand to lose as much or even more than corporations as it is difficult to believe any reputable company would hire someone who blatantly violated the FCPA.

The first obvious lesson is that the FCPA Pilot Program provides significant benefits for companies which meet its strictures. Even with the odious conduct of General Cable, the company made a stunning comeback. As much as the other enforcement actions announced since the implementation of the Pilot Program, this enforcement action has changed the calculus around self-disclosure. If the call is anywhere close, a company should self-disclose. Yet that is only the first step, as the other prongs must also be met to obtain the discount offered.

Regarding the second prong of significant cooperation, a couple of things stand out. The first no doubt warms the heart of Mr. Translations (Jay Rosen) by specifically stating that General Cable produced voluminous documents, including translations. Next was the manner of production, performed in way, “that did

not implicate foreign data privacy laws; collecting, analyzing, and organizing voluminous evidence and information for the DOJ". Jonathan Armstrong once said on a podcast that it was his experience there were usually numerous ways to produce documents and other evidence in a manner that did not violate certain countries' data privacy. General Cable would seem to have found a way to do so. This may require the compliance practitioner to use some creativity or bring in experienced data privacy counsel but the clear import is the DOJ expects such efforts in document and other evidence production. Finally, was the notation that General Cable disclosed "conduct to the DOJ that was outside the scope of its initial voluntary self-disclosure." This sets an expectation for companies to continue their investigations and turn over new or additional findings.

Next, there were several remediation areas that stood out. The first was termination of recalcitrant employees and those third-party agents and distributors who participated in the misconduct. Next a Chief Compliance Officer (CCO) was hired who reported to both the Chief Executive Officer (CEO) and the Audit Committee of the Board.

Interestingly was the requirement for operationalization of compliance into the business units of the company. The NPA stated, the company developed a "comprehensive compliance program that integrates business functions into compliance leadership roles, is designed to deliver clear and consistent communications and expectations Company-wide through policies and procedures, and includes frequent leadership communications to all employees." This final clause speaks to the importance of not only tone at the top but continued communications from the senior management of the organization.

This operationalization also went down to the revamped third party program. The NPA specifically noted the company had built "a system for third-party due diligence that assigns ownership to business personnel to shepherd prospective third parties through a comprehensive risk assessment, review, and approval process." This step clearly requires business unit involvement at the beginning and, indeed, all the way through the lifecycle of third party management.

Finally, remediation Step 10, which specified that the company would be "Delivering ***tailored*** face-to-face compliance training, including training on the FCPA, to the Board of Directors and senior executives, Internal Audit personnel, sales leaders, and all salaried employees." [emphasis supplied]. The word ***tailored***

communicates the DOJ's expectation for training far beyond the standard out of the box compliance training. It means you must put on training which is not only designed for the risk group it is being presented to but you must have some thought into the different risks for each discipline within an organization and their respective role in any compliance program.

As the final enforcement action of 2016, the General Cable matter may well be one of the most significant for the compliance practitioner as it clearly states the need to operationalize a compliance program. From the FCPA enforcement year for the record books, it could be the case which portends the most significant step in *doing compliance* forward. Finally when Hui Chen speaks through the vehicle of a FCPA resolution, the compliance profession should listen.

This publication contains general information only and is based on the experiences and research of the author. The author is not, by means of this publication, rendering business, legal advice, or other professional advice or services. This publication is not a substitute for such legal advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified legal advisor. The author, his affiliates, and related entities shall not be responsible for any loss sustained by any person or entity that relies on this publication. The Author gives his permission to link, post, distribute, or reference this article for any lawful purpose, provided attribution is made to the author. The author can be reached at tfox@tfoxlaw.com.

© Thomas R. Fox, 2017