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Latest FCPA Actions Target Foreign Companies and Promulgate New Compliance Guidelines

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On November 4, 2010, the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") announced the simultaneous resolution of seven investigations related to the Foreign Corrupt Practices Act ("FCPA") – an unprecedented event in FCPA enforcement. The settlements included criminal fines, disgorgement of profits, interest and penalties, totaling $236.5 million.

The settlements and guilty pleas, which involved companies in the international transport business and the oil and gas business, are notable for several reasons. First, several of the settlements involved non-U.S. companies located in Switzerland, France, the Cayman Islands, and Nigeria. These corporations were charged with a variety of offenses, including violations of the anti-bribery provisions and the books and records provisions of the FCPA, or with conspiracy and aiding and abetting those violations. Two corporations, one a U.S. corporation and the other a French corporation, pleaded guilty. Second, the relevant non-prosecution, deferred prosecution and plea agreements also included a document entitled "Corporate Compliance Program," to which the corporations agreed to adhere. This document provides an important outline of the government's expectations with respect to an effective anti-bribery program.

Actions Against Foreign Corporations

While the FCPA generally applies by its terms to U.S. "issuers" of securities, U.S. "domestic concerns" or U.S. "persons", these cases demonstrate that even foreign companies can run afoul of its provisions in a variety of ways. Here many of the allegations relate to bribery of foreign customs officials, often not by the company charged but by an affiliate. Moreover, the allegations of books and records violations deal with false record entries, not only by the bribing company but also by its U.S. parent, or by its beneficiary customers. In addition, the government here has applied both conspiracy and aiding and abetting charges to widen its application of FCPA provisions.

The settlements and pleas involve an intricate web of foreign companies with U.S. subsidiaries or affiliates. Among those companies are Panalpina World Transport (Holding) Ltd. ("Panalpina World"), a Swiss company, and its customers, Shell Nigeria Exploration and Production Company, Ltd. ("Shell Nigeria"), a Nigerian company, and Tidewater Marine International, Inc. ("Tidewater"), a Cayman Islands company. DOJ appeared to apply the FCPA to Panalpina World based on the bribery activities of its various subsidiaries and affiliates, including a U.S. subsidiary, on behalf of its customers Shell Nigeria and Tidewater. The U.S. subsidiary pleaded guilty to conspiracy and aiding and abetting books and records violations committed by Shell Nigeria and Tidewater. Shell Nigeria was covered by the FCPA because its parent, Royal Dutch Shell, has American Depository Receipts traded on the New York Stock Exchange. Tidewater, although a Cayman Islands company, is also a subsidiary of a U.S. issuer. Both of these companies entered into deferred prosecution agreements.

Pride Forasol, S.A.S., a French company, which is a wholly owned subsidiary of a U.S. company, pleaded guilty to conspiracy and a violation of the anti-bribery provisions of the FCPA because bribe payments on its behalf were authorized by affiliated U.S. entities and their personnel. It also pleaded guilty to aiding and abetting a violation of the books and records provision of the FCPA because it falsely characterized bribe payments, which were then reported incorrectly by its U.S. parent company. The parent company, meanwhile, entered into a deferred prosecution agreement on charges of conspiracy to violate the anti-bribery and the books and records provisions of the FCPA.

Noble Corporation, another Swiss company, was the only company to enter a non-prosecution agreement. It did so based on allegations against a Cayman subsidiary with U.S. operations for the latter's role in making improper payments to customs officials and for improper record keeping practices. These allegations related to actions of the subsidiary prior to its acquisition by the Swiss company.

The above actions demonstrate that both DOJ and the SEC are actively pursuing foreign companies with U.S. affiliates at any level.

New Guidance on Best Practices

While the Corporate Compliance Program guidelines made part of the settlements apply specifically to the corporations charged in these cases, they provide new guidance on best practices, clarifying the U.S. government's "minimum" expectation of what every corporation needs to establish an effective FCPA compliance program. The following is a summary of the thirteen points included in the various agreements and should serve as the foundation of any FCPA compliance program.

1. Visible corporate policy on anti-corruption laws
2. Senior management commitment to corporate anti-corruption policy
3. Anti-corruption policies and procedures on:
    - Gifts
    - Hospitality, entertainment and expenses
    - Customer travel
    - Political contributions
    - Charitable donations and sponsorships

- Facilitation payments
- Solicitation and extortion

4. Anti-corruption policies based on risk assessments, including geographic organization, governmental contacts and licenses

5. Annual review of anti-corruption compliance standards and procedures

6. Senior management oversight with direct reporting obligations to the company's independent monitoring bodies, including internal audit, the board of directors, or any appropriate committee of the board of directors

7. Internal controls to ensure that accounts cannot be used for the purpose of foreign bribery or concealing such bribery

8. Training and annual certifications for all directors, officers, employees, and, where necessary and appropriate, agents and business partners

9. Maintenance of an effective system for:

   a) Providing guidance and advice to directors, officers, employees, and, where necessary and appropriate, agents and business partners

   b) Internal and, where possible, confidential reporting of suspected breaches of law or ethics by directors, officers, employees, and, where necessary and appropriate, agents and business partners, and protection of those so reporting

   c) Responding to such requests and undertaking necessary and appropriate action in response to such reports

10. Appropriate disciplinary and remedial procedures where misconduct is discovered

11. Due diligence and compliance requirements for agents and business partners

12. Contractual compliance terms and conditions with agents and business partners to prevent anti-corruption violations

13. Periodic review and testing of the company's anti-corruption compliance procedures

By establishing these elements as a base line for FCPA compliance programs, the U.S. government has provided insight into what it considers the minimum standards for such a program. By implementing these elements into an FCPA compliance program, a corporation will be less likely to run afoul of the FCPA, and in the event that it does, the potential penalties may be reduced or eliminated.

United Kingdom Bribery Act

Separately, we should note that the new anti-bribery law in the United Kingdom (the "U.K. Act"), which will apply to any company that has a business presence in the U.K. and individuals associated with those companies, provides that an effective compliance program is the only affirmative defense to otherwise

strict corporate liability for anti-corruption violations. Although the final U.K. government guidance is not expected until early 2011 as to how such a compliance program must be structured to provide a safe harbor, the draft guidance suggests and considered opinion confirms that it will have to be broader than what is required under the FCPA.

Conclusion

The breadth of application of the FCPA to foreign companies in the above cases and the compliance practices made part of the respective settlements should cause any company involved in international business to renew carefully its commitment to anti-bribery measures. This lesson should be brought home even more forcefully by the emphasis on effective compliance programs in the new U.K. Act. Accordingly, companies would do well to consider adding and implementing such additional terms and provisions in their compliance programs in order to meet or exceed the standards under both statutes.[1]

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[1] For additional information on the U.K. Bribery Act, please refer to our articles of May 5, 2010, “UK Bribery Act: Aggressive Anti-Corruption Enforcement Enacted”; September 22, 2010, “UK Bribery Act 2010 Update -- Public Consultations Underway”; September 28, 2010, “UK Bribery Act 2010 -- You Will be Judged by the Company You Keep”; and October 5, 2010, “UK Bribery Act -- Extraterritoriality Squared.”