Regulators Take Aim at Acts of Foreign Bribery:

Heightened Necessity for Foreign Corrupt Practices Act Compliance Programs and Procedures

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Recently, the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") have dramatically increased their enforcement of the Foreign Corrupt Practices Act ("FCPA"). Enacted by Congress in 1977 to prohibit U.S. businesses from bribing foreign government officials, the anti-bribery provisions of the FCPA were rarely enforced for many years. But recently the number of FCPA-related matters handled by the DOJ and the SEC has spiked markedly. As reported in yesterday's Wall Street Journal, there are currently 120 FCPA investigations pending, up from 100 at the end of last year. The DOJ and the SEC brought a total of 71 cases in 2007 and 2008. By way of comparison, there were five FCPA cases brought in 2004 and only two FCPA cases brought in 2003.

For years, many practices prohibited by the FCPA — ranging from outright bribery to treating foreign government officials to lavish meals and entertainment, and showering them with gifts — were considered a standard part of doing business in certain parts of the world. But now companies risk government investigation and the prospect of severe sanctions for these practices.

The government has not only increased its scrutiny of potential FCPA violations, but has also significantly upped the ante for non-compliance. Just two years ago, in April 2007, the largest FCPA-related penalties to date were the $44 million in payments by Baker Hughes to the DOJ and the SEC. This past December, German multinational Siemens AG paid $800 million — nearly twenty times what Baker Hughes paid in 2007 — to settle DOJ and SEC allegations that the company had spent more than $1 billion bribing government officials to win infrastructure contracts around the world. (The FCPA applies to Siemens and other multinational corporations whose stock trades on U.S. exchanges.) While Siemens did not admit to bribery as part of the DOJ settlement, the company did acknowledge that it had inadequate controls and kept improper accounts.

This past February, another major company agreed to hundreds of millions of dollars in FCPA-related fines: Kellogg Brown & Root LLC and its former parent, Halliburton Co., pleaded guilty to bribing Nigerian officials. In light of payments of $579 million to the government, the DOJ agreed not to prosecute Halliburton. The sanctions were the largest ever paid by a U.S. company for an FCPA violation.

These significantly increased monetary sanctions for FCPA violations stem in part from a change in the way U.S. regulators calculate disgorgement in FCPA cases. In recent years, the government has sought to recover all profits earned from any business obtained as a result of bribery. The government has also expanded the scope of its FCPA inquiries to include worldwide and industry-wide bribery investigations. Instead of limiting an inquiry to a single improper payment in a single country, the government now often asks whether an improper payment in one country is indicative of FCPA problems in other countries in which a company does business. The government now expects companies it investigates to conduct inquiries into how widespread their FCPA problems may be. If a company doesn't undertake such an inquiry as part of an internal investigation, the government is likely to insist that a compliance consultant be appointed to do so as part of the resolution of the matter. These broader inquiries open the door to more extensive findings of FCPA violations, and consequently larger financial sanctions.

Notably, efforts by U.S. government agencies to step up enforcement of the FCPA parallel similar efforts by government authorities in other countries to enforce their own anti-bribery laws. Cooperation between regulators in different jurisdictions is now increasingly common, raising the potential for penalties in multiple jurisdictions for the same underlying conduct. For example, in addition to the $800 million in fines the company paid in the United States, Siemens also paid more than $800 million in penalties to the Office of the Prosecutor General in Munich for the same alleged bribes. In addition, increased government ownership interests in many industries have raised difficult questions about who is a "foreign official" within the meaning of the FCPA and have heightened the global focus on the enforcement of anti-bribery statutes.

In view of the enormous risks of non-compliance with the FCPA, every company doing business in the United States or selling stock in the United States (including ADRs) should have a clear FCPA policy and a robust FCPA compliance program. Companies subject to the FCPA should:

- Provide adequate training on FCPA issues;
- Have procedures in place for the selection and ongoing monitoring of third-party agents;
- Obtain periodic certifications regarding FCPA compliance from relevant employees and third-party agents;
- Ensure that financial accounting systems are in place that allow for a centralized review of all financial transactions;
- Maintain internal systems for employees to report potential FCPA violations to senior management; and
- Establish a protocol for dealing with FCPA violations if they arise.

When a potential FCPA violation surfaces, the government expects companies to conduct internal investigations into the actions at issue. Our Firm has extensive experience in establishing FCPA compliance policies and procedures that comport with current government expectations, as well as broad experience in conducting FCPA due diligence in the acquisition context. We also have extensive experience in conducting investigations into potential FCPA violations, and the skills needed to defend clients against FCPA-related charges brought by the DOJ and the SEC.

To learn more about our FCPA-related capabilities and how we can assist your company, please contact Peter H. Bresnan, former Deputy Director of Enforcement of the SEC who had supervisory responsibility for the SEC's FCPA program and spearheaded the SEC's FCPA cases stemming from its Oil for Food investigation, at (202) 220-7769 or via email at pbresnan@stblaw.com or Mark J. Stein, former Deputy Chief of the Criminal Division of the U. S. Attorney's Office in the Southern District of New York, at (212) 455-2310 or via email at mstein@stblaw.com.

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UNITED STATES

New York

425 Lexington Avenue
New York, NY 10017
212-455-2000

Los Angeles

1999 Avenue of the Stars
Los Angeles, CA 90067
310-407-7500

Palo Alto

2550 Hanover Street
Palo Alto, CA 94304
650-251-5000

Washington, D.C.

601 Pennsylvania Avenue, N.W.
North Building
Washington, D.C. 20004
202-220-7700

EUROPE

London

Citypoint
One Ropemaker Street
London EC2Y 9HU England
+44-20-7275-6500

ASIA

Beijing

3119 China World Tower One
1 Jianguomenwai Avenue
Beijing 100004, China
+86-10-5965-2999

Hong Kong

ICBC Tower
3 Garden Road
Hong Kong
+852-2514-7600

Tokyo

Ark Mori Building
12-32, Akasaka 1-Chome
Minato-Ku, Tokyo 107-6037, Japan
+81-3-5562-6200

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