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A legal update from Dechert's White Collar and Securities Litigation Group

U.S. Government Officials Pledge to Continue Robust FCPA Enforcement

U.S. companies operating overseas should prepare for increased scrutiny of their business transactions, according to Department of Justice (DOJ) and Securities and Exchange Commission (SEC) officials who spoke at the American Conference Institute's 18th National Conference on the Foreign Corrupt Practices Act (FCPA) in November. The speakers, including Hon. Alice S. Fisher, assistant attorney general of the DOJ's Criminal Division; Mark F. Mendelsohn, deputy chief of the DOJ's Criminal Division-Fraud Section; Fredric D. Firestone, associate director of the SEC's Division of Enforcement; and William D. Jacobson, assistant chief of the DOJ's Criminal Division-Fraud Section, promised to continue their efforts towards robust FCPA enforcement.

The SEC and DOJ share responsibility for enforcing the FCPA, which was enacted in 1977 to deter and punish bribery of foreign officials by American companies, foreign companies whose shares are traded on U.S. exchanges or act in the U.S., and foreign businesses if the conduct is directed by U.S. persons.¹ The act makes it a crime to "corruptly" offer any kind of payment to a foreign official "in order to assist . . . in obtaining or retaining business."² It also contains a "books and records" provision that requires a company to keep books, records, and accounts in reasonable detail to reflect accurately and fairly transactions and dispositions of assets, and to devise and implement an adequate system of internal accounting controls.³

Comments made by key SEC and DOJ officials at the November conference indicate that companies

should prepare for continued intensification of FCPA enforcement.

Greater Enforcement Activity: More Resources and Harsher Penalties

The year 2007 has been the most active year in the history of FCPA enforcement, with the frequency of enforcement actions growing from three actions filed against corporations in 2004 to 13 filed thus far in 2007. The increased frequency of FCPA enforcement actions is accompanied by enhanced penalties for FCPA violations, including the imposition of significant fines, criminal charges filed against corporate employees, and the threat of substantial disgorgement penalty fees.

Higher fines, including the two largest ever levied for FCPA violations, should encourage companies across a range of industries to prioritize FCPA compliance. Notably, a \$44 million fine for bribery in Kazakhstan was levied in April of this year against oil-field services company, Baker Hughes Inc., and a subsidiary company. More recently, a \$12 million fine was imposed last month against heating and cooling company, York International, for bribes and kickbacks paid to Iraqi-controlled accounts in connection with the U.N. Oil for Food program.

The government has also increased its emphasis on charging individuals with FCPA violations, including seven so far this year. Officials at the November conference suggested that there will be more cases announced before the end of the year.

¹ 15 U.S.C. § 78dd

² 15 U.S.C. § 78dd-1(a)

³ 15 U.S.C. § 78m(b)(2)

Finally, companies should be wary of the SEC's increased efforts to seek disgorgement of monies obtained through corrupt practices. Disgorgement penalties can potentially include the entire gross revenue from a corruptly-obtained contract.

The government has dedicated considerable resources to increased FCPA enforcement. The DOJ recently assigned several FBI agents to work exclusively on FCPA matters. It also further developed its FCPA training provided to other field agents. This means enforcement actions may continue to rise as authorities increase their use of traditional investigative techniques such as wiretaps and search warrants. In addition, more cases are coming to the government's attention through whistleblowers and other unsolicited tips.

International Cooperation: The Fight Against Corruption Goes Global

In addition to being the 30th anniversary of the FCPA, 2007 is also the 10th anniversary of the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, an international treaty that, like the FCPA, seeks to deter and punish bribery of government officials. DOJ representatives emphasized that they work closely with their counterparts from other countries to combat corruption by sharing information through formal and informal channels. According to the officials, this allows each country to target its enforcement activities where they will be most effective, allows more investigations to be launched, and more cases to be brought. This increased cooperation leads to an enhanced ability to investigate corruption and bring enforcement actions and prosecutions.

Targeted Enforcement: Companies Face Prospect of Industry-Wide Investigations

Government officials also said that if they learn, whether through a government-initiated investigation or through a voluntary disclosure, that a particular corrupt practice is common in an industry, it is likely that the entire industry will be subject to scrutiny. Companies should not be lulled into believing that a practice is acceptable because all of its competitors are also doing it—if a corrupt practice is widespread, there may well be widespread government enforcement action.

Preparation Is Key: The Continuing Importance of Due Diligence

The officials said that one of the best ways to avoid entanglement in an FCPA case is to engage in thorough due diligence, both in the merger and acquisition context and when contemplating entering a business relationship with a third party. It is well established that if a company acquires or merges with a company that has engaged in corrupt practices, FCPA liability can transfer to the acquirer. According to the government speakers, robust transactional due diligence related to foreign corruption is now considered a "best practice" but is not yet universal. In addition, a company can be liable under the FCPA if a contractor or third-party makes a corrupt payment on the hiring company's behalf, even if the hiring company had no actual knowledge of the payment. While the government representatives recognized that there is no "one size fits all" model for third-party due diligence, it is nonetheless crucial to ensure that partners or contractors do not have a record of bribery.

A Difficult Decision: The Possible Benefits of Voluntary Disclosure

One of the more difficult questions facing a company that discovers an FCPA violation is whether to voluntarily disclose the violation to the DOJ and SEC. Government officials at the conference claimed that there is a "real and tangible benefit" to voluntary disclosure, based on the government's corporate charging principles and the federal sentencing guidelines. According to the representatives, there are many instances of companies that do voluntarily disclose but are not charged. In addition, while failure to disclose is not considered an aggravating factor, failure to remediate is an aggravating factor. Therefore, the officials emphasized that if a company decides not to voluntarily disclose a corrupt practice, the company should undertake thorough and well-documented investigation and remediation efforts, including appropriate disciplinary measures.

Additional Risks: The FCPA and Other Criminal Laws

Government officials are also seeing an increasing nexus between FCPA violations and other business crimes such as money laundering, violations of export controls, and attempts to evade sanctions. Companies

SIGNIFICANT 2007 FCPA FINES AND PENALTIES

Baker Hughes International	\$44 million
Chevron Corporation	\$30 million
Vetco Gray Int'l, Ltd.	\$26 million
York International Corp.	\$12 million
El Paso Corp.	\$7.7 million
Ingersol Rand Co. Ltd.	\$6.7 million

should be alert to these connections and be aware that a robust FCPA compliance program will also help them deter these other crimes, some of which could be even more damaging to a company's reputation. In

addition, while commercial bribery (bribery that does not involve a government official) is not illegal under the FCPA, such conduct is potentially covered by other U.S. statutes, even if committed outside the United States, and is illegal under the laws of many, if not most, other jurisdictions.



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