

June 27, 2008

**\$32 MILLION IN SANCTIONS AGAINST HOUSTON FIRM HIGHLIGHTS  
U.S. ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT**

The United States government's increase in enforcement of the Foreign Corrupt Practices Act ("FCPA") during the past five years has raised awareness of domestic and foreign corporations to the Act's requirements. Still, violations continue to make headlines. The latest news came from Houston May 14, when an oil and gas services company agreed to pay \$32 million in sanctions for FCPA violations in connection with international contracting activities.

Enforcement actions and investigations during the past few years have spanned the globe and touched several different industries. Record monetary penalties have been imposed and a greater number of individuals have been sentenced to prison for FCPA violations. As a result, many companies—both domestic and foreign—are focusing greater concentration on their anticorruption compliance programs.

The government's concentration on the FCPA is unlikely to wane in the near term. The Department of Justice's Fraud Section has expanded its resources dedicated to FCPA prosecution. Importantly, the Federal Bureau of Investigation recently assigned four agents to the Fraud Section to conduct FCPA investigations. In late 2007, the FBI estimated that there were 50 agents actively involved in investigations of FCPA violations.

**Overview of the Foreign Corrupt Practices Act**

The FCPA was enacted in 1977 as part of a post-Watergate legislative effort aimed at rooting out public corruption. Its provisions apply to American citizens and companies, foreign companies that are traded on an American exchange, and anyone else who acts in furtherance of a corrupt payment while in the territory of the United States.

**Two Components of the FCPA**

The FCPA is characterized as having two primary components: the antibribery provisions and the accounting provisions. Although the DOJ is traditionally considered the enforcement agency for the antibribery statutes, recent prosecutions arising out of the United Nations Oil for Food program illustrate the Department's ability and willingness to bring actions under the books and records statutes as well. The Securities and Exchange Commission shares responsibility for enforcement of the FCPA and is commonly considered the primary enforcement agency for the Act's accounting requirements.

The FCPA's antibribery provisions generally prohibit giving (or offering) anything of value to a foreign official, political party, or political candidate to corruptly influence the recipient's performance of duties for the purpose of obtaining or retaining business. Bribery of foreign officials to obtain contracts falls squarely within the core of this prohibition, but the FCPA reaches much further than

this traditional notion of official bribery. Any corrupt payment that provides the company an improper competitive advantage—through, for example, lowering taxes or import duties—is potentially the subject of an FCPA prosecution.

The accounting provisions of the FCPA require generally that an issuer's books and records "accurately and fairly reflect the transactions and dispositions of the [company's] assets," 15 U.S.C. § 78m(b)(2)(A), and also mandates that the issuer maintain sufficient internal controls, *id.* § 78m(b)(2)(B). Unlike most securities fraud statutes, there is no materiality threshold for violation of the FCPA. However, criminal liability under the accounting provisions is reserved for *knowingly* failing to enact or circumventing internal controls or *knowingly* falsifying records. Enforcement actions under the antibribery provisions are often accompanied by allegations of books and records violations, as records of kickback payments are seldom documented in the company's records accurately and in reasonable detail.

### Exceptions to the FCPA

Three types of influencing payments are excepted from the FCPA. First, the statute specifically states that facilitating payments (or "grease payments") do not violate the FCPA. Such payments are nominal amounts paid to government officials for the performance of what are typically considered nondiscretionary functions, such as issuing licenses or permits. The vagueness of the FCPA, however, creates considerable gray areas related to facilitating payments, and many U.S. companies, through internal policies, have prohibited facilitating payments outright rather than hope for a favorable construction of the statute.

The FCPA also creates two affirmative defenses to prosecution. The first permits payment of reasonable expenses related to the promotion, demonstration, or explanation of a product. This exception is typically associated with travel and lodging expenses for officials to view a product demonstration or visit/inspect a company factory. Reasonableness is the touchstone of this exception, and the defense is typically not available for payment of first class travel or lavish accommodations. Enforcement activity related to travel and entertainment expenses has focused on paid travel for foreign officials that is not reasonably tied to business. For example, in December 2007, Lucent Technologies agreed to pay \$2.5 million in fines and penalties related to the provision of trips for Chinese telecommunications officials that were primarily for sightseeing, entertainment, and leisure.

The second affirmative defense excepts bribe payments that are legal under the written law of the foreign official's country. This defense does not apply to countries where bribery is considered commonplace or standard course of conduct. Instead, it is available only where a country's *written* law permits bribery. We are aware of no country that permits bribery under its written law; therefore, this defense has little usefulness, if any.

### Consequences of an FCPA Violation

Individuals who violate the FCPA may, in some cases, be imprisoned for up to 20 years and fined \$5,000,000. Monetary penalties assessed to corporate officers, directors, and employees cannot be reimbursed through corporate indemnification.

Companies that violate the FCPA may be required to pay a fine of up to \$25,000,000 or twice the gain obtained from the violation. This criminal fine, however, is only the beginning of the consequences. The company may also be required to disgorge profits obtained from the violation. Additionally, settlement agreements with the government have commonly required companies to maintain, at their own expense, a corporate monitor to supervise the company's FCPA compliance program and report observations to the government. An FCPA violation can also lead to a company's debarment from future government contracts and the rescission of its export license.

### Recent Enforcement Trends

FCPA prosecutions in the past year have involved allegations of improper payments in several regions of the world, including the Middle East, South and Southeast Asia, West Africa, and Eurasia. Several trends are illustrated by the government's enforcement activities:

- **Increased Enforcement Activity.** The most evident trend in FCPA enforcement is the dramatic and sustained increase in FCPA investigations and prosecutions in the past five years. The number of individual criminal prosecutions has doubled since 2003, and the volume of known DOJ investigations during that time has almost tripled.
- **Larger Monetary Penalties.** The monetary penalties imposed for FCPA violations have increased significantly. In February 2007, three subsidiaries of Vetco International Ltd. agreed to pay a record-setting \$26 million fine for FCPA violations in Nigeria. Just two months later, Baker Hughes agreed to pay \$44 million in fines, disgorgement, and civil penalties—the largest collective monetary sanction ever imposed—for conduct in Kazakhstan. Finally, in May 2008, Willbros Group agreed to pay a \$22 million fine, and \$10 million in civil penalties and disgorgement for FCPA violations in Nigeria, Bolivia, and Ecuador.
- **Enforcement Against Foreign Entities.** The U.S. government has demonstrated the extra-territorial reach of the FCPA by increasing its enforcement against non-U.S. entities. Foreign companies that trade on U.S. exchanges, such as the Norwegian company Statoil, have found themselves the subject of American enforcement efforts. Additionally, the criminal prosecution of French citizen Christian Sapsizian illustrates the government's willingness to prosecute bribery that is only tangentially related to the United States. In that case, Sapsizian—a French employee of a French company—was prosecuted for bribe payments to Costa Rican officials. The DOJ found that it had jurisdiction to prosecute him under the FCPA because the employer's American Depository Receipts were traded on the New York Stock Exchange.

- **Voluntary Disclosure of Violations.** A great majority of the government's investigations initiated in 2007 were prompted by voluntary corporate disclosures that followed internal investigations. Whether prompted by the disclosure requirements of the Sarbanes-Oxley Act or by DOJ promises of "real and tangible benefits" from voluntary disclosure, it is clear that a significant portion of the increased enforcement activity is fueled by corporate self-disclosure.
- **Due Diligence in Mergers and Acquisitions.** Many of the violations voluntarily disclosed to the government were first discovered through due diligence efforts in corporate mergers and acquisitions. DOJ officials have stated publicly that the Department expects companies to incorporate FCPA due diligence into the standard procedures for M&A activities and warn that failure to conduct sufficient due diligence in this area can lead to successor liability.

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Haynes and Boone, LLP has extensive experience in FCPA matters. If you would like advice on the matters mentioned in this Foreign Corrupt Practices Act Alert, or more information, please contact one of the Haynes and Boone attorneys listed below.

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