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Bribery: U.S. is cracking down on payments made under table

BY DENA PALERMO AND PAUL L. MITCHELL
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At the start of 2007, the Securities and Exchange Commission and the Department of Justice demonstrated that they plan to aggressively crack down on bribery by companies operating abroad.


Palermo


Mitchell

The SEC and DOJ instituted actions against companies alleged to have participated in bribery of foreign officials, resulting in record-setting settlements and a flurry of self-reporting, particularly by energy services companies.

The primary vehicle utilized by the SEC and DOJ for this offense is the Foreign Corrupt Practices Act, or FCPA, which prohibits bribery of any foreign official, regardless of rank or position, to "obtain or retain business." This phrase has been broadly interpreted by the courts to include any payments that have a business nexus and give a competitive advantage. The FCPA contains accounting requirements which demand that every issuer of public securities make and keep accurate books and records.

Any SEQ CHAPTER\h\r 1company that either operates or is publicly traded in the U.S. must comply with the FCPA. Third parties acting on behalf of such entities are also subject to the FCPA. Anyone found in violation of the FCPA is subject to substantial fines, imprisonment and/or forfeiture of property.

RECENT DEVELOPMENTS

Three subsidiaries of Vetco International Ltd. recently pled guilty in federal court in Texas to numerous violations of the FCPA. As part of the plea agreement, the Vetco defendants agreed to pay criminal fines of $26 million — the record for a purely criminal investigation — in addition to independent compliance monitoring and other commitments.

The Vetco entities were accused of making payments totaling over $2 million during a two-year period to Nigerian customs officials to obtain expedited treatment of goods and materials in customs. None of the payments were alleged to have been made to obtain contracts or other business. Instead, the rationale was that such payments gave Vetco an improper business advantage and focused largely on Vetco's use of an unnamed freight-forwarding agent.

Recently, Panalpina World Transport Holding Ltd. issued a press release, stating that it was cooperating with a government investigation into its operations in Nigeria, Kazakhstan and Saudi Arabia, that "was triggered by the plea agreement" of one of its customers.

Shortly after the Vetco plea, Baker Hughes Inc. agreed to pay a total of $44 million — the largest penalty ever imposed in an FCPA case — to settle civil and criminal charges brought by the SEC and DOJ alleging violations of both the anti-bribery and books and records provisions of the FCPA. In addition to the steep monetary penalties, the settlement required Baker Hughes to employ an independent compliance monitor to oversee the company's operations, as well as other concessions.

DOJ recently announced the indictment of a Willsbros Group Inc. employee who allegedly paid about $6 million in bribes to get and retain an engineering and construction contract in Nigeria. This action evidences the government's determination to go after individual employees as a deterrent to further violations.

Recent events also demonstrate that the government is increasingly relying on accounting violations to bring FCPA charges. It is often easier for the government to prove that the payment was not recorded correctly in the company's books and records than to demonstrate that it was a bribe.

For example, the SEC recently settled a civil action with Dow based on violations of the books and records and internal controls provisions of the FCPA in connection with "an estimated $200,000 in improper payments made by a fifth-tier foreign subsidiary of Dow to Indian government officials" over a five-year period. Dow agreed to settle in exchange for a $325,000 civil penalty and the imposition of a cease-and-desist order, a favorable outcome likely achieved because Dow self-reported.

SELF-REPORTING

As a result of the heightened enforcement environment, several companies, including Tidewater Inc., Noble Corp., Global Santa Fe Corp. and Global Industries Ltd., reported earlier this year to the SEC and DOJ that they have begun internal investigations of payments made by agents used in their West Africa operations.

On the heels of these reports, the DOJ issued letters on July 2 asking a number of additional companies that did not self-report to set up meetings within two weeks and provide detailed information on their engagement of Panalpina. Since then, Ensco International Inc. and Nabors Industries Inc. have disclosed that they are also conducting FCPA investigations.

USING AGENTS ABROAD

Using freight-forwarding and customs-clearing agents is often critical to working successfully overseas. Use of agents, however, may create a significant FCPA risk. Any company that is doing business abroad, and particularly in West Africa, should take immediate steps to determine:

- Whether it has performed appropriate due diligence on its freight forwarding and/or customs clearing agents in connection with moving vessels, equipment, cargo or personnel in or out of the region.
- Whether its books and records comply generally with FCPA requirements.

In the Vetco matter, the government identified several invoice descriptions that should raise red flags to any company clearing equipment or material through customs abroad, including "express courier service," "local processing fees," "interventions" and "evacuations."

Every company operating overseas should review and implement appropriate accounting controls to detect any past violations of the FCPA and prevent potential future FCPA violations.

Training of company employees is essential for them to understand what constitutes conduct that violates the FCPA.

DENA PALERMO is counsel and **PAUL L. MITCHELL** is a partner in the Houston office of Mayer, Brown, Rowe & Maw LLP. Their practice includes FCPA investigations.