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March 2, 2000

Foreign Corrupt Practices Act Updates

DOJ Obtains Injunction for FCPA Violations Based on Payment of Travel and Entertainment Expenses

The Department of Justice (DOJ) recently filed a civil complaint, obtained a permanent injunction, and obtained civil penalties of $400,000 in a proceeding under the United States Foreign Corrupt Practices Act (FCPA) that provides important guidance for companies who pay, or are asked to pay, travel and entertainment expenses for foreign government officials. (*United States v. Metcalf & Eddy, Inc.*, No. 1:99CV12566 (D. Mass. filed Dec. 14, 1999)).

This case makes clear that U.S. enforcement authorities are prepared to take a relatively aggressive view of what travel and entertainment expenses constitute violations of the FCPA. This case is particularly significant because, as a condition of settlement, the government required the company to implement a compliance and ethics program designed to detect FCPA violations. In doing so, DOJ spelled out its view of the minimum components of an effective FCPA compliance regime.

Background

The FCPA's antibribery provisions make it unlawful for any issuer, domestic concern, or person acting within the United States corruptly to make any offer or payment of anything of value, directly or indirectly, to a foreign official, international organization official, political party or party official, or any candidate for public office for the purpose of influencing any official act to assist the issuer, domestic concern, or person in obtaining or retaining business.[1/] The FCPA's accounting provisions require companies to keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transaction and disposition of their assets and to maintain a system of adequate internal accounting controls.[2/]

Payments to government officials for travel and entertainment expenses can constitute corrupt payments under the FCPA if they are made in return for an official act or omission or in exchange for favorable treatment. Reasonable travel and entertainment expenses, when lawful under local law, will not be considered "corrupt" absent evidence that they were paid as a quid pro quo for special favors.[3/]

The FCPA contains an affirmative defense for "reasonable and bona fide" expenditures that are "directly related" to either (1) "the promotion, demonstration, or explanation of products and services;" or (2) "the execution or performance of a contract with a foreign government or agency thereof."[4/] Payments for travel and entertainment expenses may fall within these defenses if they are made for one of the enumerated purposes and are not excessive. U.S. companies and other entities covered by the FCPA bear the burden of proof under these defenses.

1/ 15 U.S.C. §§ 78dd-1 to -3.

2/ 15 U.S.C. § 78

3/ *See* FCPA Rev. Proc. Releases Nos. 82-01 (Jan. 27, 1982), 83-2 (July 26, 1983), 83-3 (July 26, 1983), 85-1 (July 16-1985) <http://www.usdoj.gov/criminal/fraud/fcpa/revindx.htm>; The Foreign Trade Practices Act: Hearings on H.R. 2157 Before the Subcomm. On International Economic Policy and Trade of the House Comm. On Foreign Affairs, 98th Cong. 126 (1983) (Statement of Jonathan C. Rose, Assistant Attorney General).

4/ 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

FCPA Violations Charged

In its civil complaint for injunctive relief filed in United States District Court in Massachusetts, the government charged that Metcalf & Eddy, Inc., a U.S. environmental engineering firm, made corrupt payments to an Egyptian government official to assist Metcalf in its contracts with the United States Agency for International Development (USAID) in Egypt. The official traveled twice to the United States at Metcalf's invitation during periods in which the USAID contracts were under consideration. The official's wife and two children accompanied him on both trips at Metcalf's expense. While the official was in the United States, he signed an order recommending Metcalf for the contract. The contract was subsequently awarded to Metcalf.

Excessive Per Diem Payments

The USAID contracts required that travel associated with the contracts be in accord with the Federal Travel Regulations (FTRs). Under the applicable travel regulations, the official was entitled to receive, in advance, a cash per diem payment to cover his travel-related expenses. On both trips, however, the official received 150% of his estimated per diem expenses in a lump sum prior to leaving Egypt. Also on both trips, once the official and his family arrived in the United States, Metcalf paid for most of the travel and entertainment expenses incurred by and on behalf of the official and his family, although the official had already received funds for his own per diem expenses.

First-Class Airline Tickets

In addition to the per diem advances on both trips, Metcalf paid to upgrade the official's airline tickets to first class for both of his trips to the United States. The FTRs authorize only coach travel except in exceptional circumstances that were not applicable to this trip. Metcalf also paid for the official's wife and children to fly first class to the United States as part of the second trip.

Undocumented Expenses

Immediately before and during the official's second trip, a Metcalf employee obtained two undocumented cash advances, which were apparently expended in connection with the official's trip.

Complaint and Settlement

The complaint charged that payment of the following expenses were payments of cash and "things of value" under the FCPA: payment of the per diem advance, including the extra 50% per diem, with the full knowledge that the official would not be expected to pay for any of his expenses while in the United States; the first class upgrade for the official on both trips; the provision of first class airfare to the official's wife and family; and the payment of undocumented expenses.

The complaint also charged that Metcalf failed to make and keep books, records, and accounts which, in reasonable detail, accurately reflected the payment of money and things of value to or for the benefit of the official. It also faulted Metcalf for failing to establish and implement any training or compliance program that educated its employees concerning the conduct proscribed by the FCPA.

In settling with the government, Metcalf agreed not to violate the FCPA in the future, and agreed to pay a *civil fine of $400,000* and to reimburse DOJ for the costs of the investigation in the amount of *$50,000*. Metcalf also agreed to establish FCPA compliance procedures and to provide, on an annual basis for the next five years, certifications of compliance with the FCPA to USAID, DOJ, and any other U.S. agency for which Metcalf executes overseas programs or contracts.

Significance

This case is significant because it signals that U.S. enforcement agencies are prepared to take a relatively aggressive approach in interpreting what travel and entertainment expenses constitute violations of the FCPA. While this case is a settlement and not a litigated decision, it makes clear that payment of excessive per diem amounts exposes a

company to serious FCPA risk and that DOJ may take the position that even a first-class airline ticket upgrade could be an improper payment under the FCPA. Thus, even relatively small improper payments (the payments at issue were small both in absolute terms and in relation to the business at stake) can lead to substantial fines. In light of this case, prudence and caution should be the watchword for companies who pay travel and entertainment expenses for foreign government officials.

This case is also noteworthy because DOJ used it to articulate its view of the minimum components of an effective FCPA compliance program. These components are:

- a clear corporate ethics policy prohibiting violations of the FCPA and the establishment of compliance standards and procedures that are reasonably capable of reducing the prospect of violations;

- assignment of responsibility for the FCPA compliance program to senior managers;

- establishment of a committee to review and conduct due diligence on agents retained in foreign jurisdictions as well as foreign joint venture partners;

- corporate procedures to ensure that companies do not delegate substantial discretionary authority to individuals with a propensity to engage in illegal activities;

- corporate procedures, including a recorded due diligence inquiry, to ensure that the company forms business relationships with reputable agents, consultants, and representatives;

- regular training of officers, employees, agents, and consultants concerning the requirements of the FCPA;

- implementation of appropriate disciplinary mechanisms for violations or failure to detect violations;

- establishment of a system by which officers, employees, agents, and consultants can report suspected violations without fear of retribution;

- inclusion in all contracts with agents, consultants, joint venture partners, and other representatives warranties that no payments of money or anything of value will be offered, promised or paid, directly or indirectly, to any foreign official, foreign political party, party official, or candidate for foreign public or political office to induce such officials to use their influence with a foreign government or instrumentality to obtain an improper business advantage for the company; and

- inclusion in all contracts with agents, consultants, and other representatives a warranty that the agent, consultant, or representative shall not retain any sub-agent or representative without the prior written consent of the company.

For a fuller discussion of these and other FCPA issues, see Stephen F. Black and Roger M. Witten, <u>Complying with the Foreign Corrupt Practices Act</u>, I1 Business Law Monographs (Matthew Bender 1999).

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