Foreign Corrupt Practices Act

WILMERHALE

Fast Pace of FCPA Enforcement Continues

Several recent cases illustrate the US government's continuing and active enforcement of the Foreign Corrupt Practices Act (FCPA). Four involve actions against individuals related to corrupt activities abroad. The fifth is a settlement of charges that a company lacked appropriate antibribery controls.

- *First*, earlier this month, a former officer and director of InVision Technologies, Inc., a manufacturer of explosive detection systems used by airports, agreed to settle a Securities and Exchange Commission (SEC) enforcement action alleging that he indirectly caused the falsification of the company's books and records, and that he aided and abetted the company's failure to implement adequate internal controls. This settlement stems from a more than two-year investigation into corrupt payments by InVision's agents and distributors, and amply demonstrates the extent to which corporate officers, directors and employees face personal exposure under the FCPA.
- *Second*, on August 4, 2006, the Department of Justice (DOJ) announced that a US citizen working as a translator in Iraq had pleaded guilty to offering a bribe to an Iraqi police officer to secure the procurement of armored vests and other equipment for the Iraqi government. The prosecution is significant because it is one of the very few times that the government has used the FCPA's nationality jurisdiction provision to prosecute a US citizen for acts committed wholly outside the United States.
- *Third*, in July 2006, the SEC announced that four former employees of ABB Ltd., the Swiss-based provider of power and automation technologies, agreed to settle enforcement actions alleging involvement in a scheme to bribe Nigerian government officials.
- *Fourth*, in June 2006, the DOJ announced the first guilty plea of a corporate officer in its long-running bribery investigation into the activities of the Titan Corporation. The officer, a former CEO of a wholly owned African subsidiary of Titan (a provider of military intelligence and communications products), admitted to knowingly authorizing payments that would be funneled to the reelection campaign of the then-incumbent president of Benin.
- *Finally*, in the spring of 2006, Tyco International Ltd. agreed to settle an SEC probe alleging that the company, among other things, lacked adequate and effective internal controls to guard against and detect the improper activities of its overseas entities.

These government investigations, coupled with the White House's unveiling this month of a national strategy to combat "kleptocracy," continue the trend of vigorous FCPA enforcement. The past several years have witnessed an explosion in the number of FCPA enforcement actions and initiatives on combating international public corruption. These recent developments serve as a salient reminder that FCPA enforcement remains a high priority for the DOJ, the SEC and the US government more broadly.

The FCPA's Antibribery and Accounting Provisions

The FCPA's antibribery provisions make it unlawful for any issuer, domestic concern or person acting within the United States to offer or make a 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 that official to assist in obtaining or retaining business. (15 U.S.C. §§78dd-1 to -3.) A covered company can be held liable for payments made on its behalf by agents or distributors.

The FCPA's accounting provisions require companies with securities listed in US trading markets to keep books, records and accounts that accurately and fairly reflect any

transaction and disposition of assets in reasonable detail, and to maintain an adequate system of internal accounting controls. (15 U.S.C. §78m(b).) A covered company is responsible for ensuring that its controlled subsidiaries, including foreign subsidiaries, comply with the FCPA's accounting provisions.

InVision Investigation and Agreement

Earlier this month, on August 15, 2006, the SEC announced the most recent development in a two-year investigation involving InVision's sales of explosive detection machines to government-affiliated airports in three Asian countries. Well over a year ago, the DOJ and the SEC announced results of parallel criminal and civil enforcement actions against InVision, in which the company agreed to pay more than $1 million in penalties and to disgorge $589,000 in profits for allegedly pursuing transactions while aware of a high probability that its foreign sales agents and distributors were making improper payments to government officials. The prosecution against InVision was significant as it marked the first time that the DOJ agreed to sign a Non-Prosecution Agreement in the FCPA context. Our firm served as co-counsel for the Special Investigation Committee of InVision's Board of Directors in connection with the investigation and negotiation of the agreement with the DOJ. (See WilmerHale Foreign Corrupt Practices Act Update for January 5, 2005.)

On August 15, 2006, the SEC announced that David Pillor, InVision's former Senior Vice President for Sales and Marketing and a former member of the company's board of directors, agreed to pay a $65,000 civil penalty to settle a two-count complaint alleging that he was partly responsible for the company's FCPA violations. In the first count, the SEC alleged that Pillor indirectly caused the falsification of the company's books and records. This allegation was premised on Pillor's receipt of emails from a regional sales manager alluding to the fact that the company's agents and distributors intended to offer cash, gifts and complimentary trips to government officials, but Pillor later submitted invoices concealing the probable nature of these payments to the company's finance department.

In the second count, the SEC alleged that Pillor failed to exercise his authority to implement adequate internal controls and to ensure that InVision's foreign sales managers, agents and distributors complied with the FCPA. Given this inaction, the SEC alleged that Pillor aided and abetted InVision's violation of the FCPA's internal controls requirements. The SEC's papers allege that the internal controls inadequacies included deficient due diligence on foreign sales agents and distributors, and a failure to provide formal FCPA training to—and to monitor the actions of—foreign sales managers, agents and distributors.

The implications of this case for corporate officers, directors and employees cannot be overstated. Two critical lessons emerge from this case. First, while the accounting provisions are directly applicable to issuers, the SEC takes the view that officers, directors and other natural persons may be personally liable for "causing" the falsification of the company's books and records. In fact, according to the SEC, an individual who suspects that others are engaged in acts violative of the FCPA and then takes specific actions—such as requesting payment on dubious invoices—may be subject to enforcement proceedings. Second, under US securities laws, individuals may be civilly liable for inadequacies in a company's internal controls under an accomplice theory. In other words, an officer, director or employee who has both a suspicion of improper business practices and the authority to implement internal controls may be liable for aiding and abetting the implementation failures. This case underscores the importance for supervisory officers to ensure the adoption of robust corporate compliance programs and controls, as well as the need for officers, directors and employees to respond appropriately and quickly to suspected violations.

Iraqi Translator Investigation and Agreement

On August 4, 2006, the US District Court for the District of Columbia accepted the guilty plea of a US citizen and former employee of the Titan Corporation, Faheem Mousa Salam, for offering a bribe to a senior Iraqi police official in violation of the antibribery provisions of the FCPA. Unrelated to his work as a civilian translator, Salam promised to pay a $60,000 bribe to an Iraqi police official to arrange the purchase of approximately $1 million of equipment, which included thousands of armored vests and a sophisticated map printer. According to the government's papers, the Iraqi police official in turn notified the Office of the Special Inspector General for Iraq Reconstruction (SIGIR), a temporary US federal agency responsible for monitoring funds intended for Iraqi reconstruction, of Salam's proposal. The SIGIR then commenced an investigation, during which Salam offered to pay an undercover SIGIR agent at least $28,000 to process the contracts. Notably, Salam cancelled the transaction before paying the bribes, thus illustrating that it is not necessary under the FCPA for a bribe either to be consummated or to be effective in obtaining business.

The prosecution against Salam also is significant because it marks one of the few instances in which the DOJ has used the FCPA's nationality jurisdiction provision to charge an individual. Added to the FCPA in 1998, the nationality jurisdiction provision (15 U.S.C. §78dd-2(i)) permits the government to charge US citizens and companies with bribing a foreign government official even when the offense is committed outside the United States and there is no other connection to the United States other than the nationality of the violator. The Salam prosecution demonstrates the government's efforts to use all of the tools available to it to expand its ability to prosecute those engaged in official corruption.

Finally, the Salam plea may well be a harbinger of other FCPA enforcement actions. In its July 30, 2006, report to Congress, the SIGIR announced that it is currently investigating well over 20 cases involving possible bribery; that many of these cases await prosecution at DOJ; and that SIGIR recently has partnered with the Federal Bureau of Investigation to enhance its ongoing criminal enforcement efforts.

ABB Investigation and Agreements

On July 5, 2006, the SEC announced the most recent results in its long-running investigation involving ABB Ltd. (ABB) and several of its subsidiaries. Previously, in July 2004, the DOJ and SEC announced results of parallel criminal and civil enforcement actions against ABB and two of its subsidiaries—Houston-based ABB Vetco Gray Inc. (Vetco Gray US) and Scotland-based ABB Vetco Gray UK, Ltd. (Vetco Gray UK). As a result of the July 2004 settlements, ABB and its subsidiaries paid a total of $16.4 million in penalties and disgorged over $1 million in bribes paid to Angolan, Kazakh and Nigerian government officials. Our firm represented an individual in the ABB case. (See WilmerHale Foreign Corrupt Practices Act Update for July 27, 2004.)

The July 2006 announcement related to settlements with four former ABB executives for their role in the Nigerian bribery scheme. The SEC's papers allege that these former executives violated the FCPA's antibribery provisions by paying bribes to secure a lucrative contract to provide equipment for an oil-drilling project in Nigeria's offshore Bonga Oil Field. In particular, the SEC's filings allege that, from 1999 through 2001, the four former executives participated in a scheme using a local consultant as a conduit to make payments totaling $800,000 in bribes to Nigerian government officials. In addition, the officials were provided with $176,000 in cash and gifts while visiting the United States—including hotel accommodations, lavish meals, car services and other unspecified gifts. Each of the former employees was charged with making these payments to assist ABB in obtaining the Bonga contract, which was worth $180 million in revenue to the company.

Of particular note is the fact that three of the former executives are UK citizens and were employed by various ABB non-US subsidiaries. Despite their tenuous links to the United States, a US court possesses jurisdiction over these defendants for violations of the FCPA's antibribery provisions because their scheme made use of the US mails and/or the means or instrumentalities of interstate commerce (in this case the complaint notes phone calls, emails and bank transfers to/from the United States). This settlement demonstrates the need for issuers and domestic concerns to ensure that employees—including those working outside the United States—fully comply with the FCPA. The settlement also serves as yet another example of an enforcement action in which US regulators determined that the provision of entertainment, hotel accommodations and gifts served to improperly influence foreign officials in the performance of their official duties.

Finally, the complaint alleges that the former employees themselves knowingly violated—and aided and abetted ABB in violating—the FCPA's accounting provisions. The complaint charges that the former executives inaccurately reported the consulting and entertainment expenses as legitimate business expenses, and that these inaccurate reports subsequently were entered on the company's books and records. Like the recent InVision agreement, this case demonstrates that the government continues to use the accounting provisions as a principal focus of FCPA enforcement.

Titan Investigation and Agreement

On June 23, 2006, the DOJ announced the first guilty plea of a corporate officer in its two-year investigation involving the activities of a Titan telecommunications project in Benin. Well over a year ago, Titan itself settled parallel DOJ and SEC enforcement actions alleging improper payments to an agent in Benin, which, according to the government, were passed on to the reelection campaign of the then-incumbent president of Benin. The March 2005 settlement represented the largest FCPA penalty to date—$28.5 million, which consisted of a criminal penalty, "disgorgement" paid in connection with the SEC settlement and prejudgment interest on the disgorgement amount. Our firm acted as co-counsel for Titan in those proceedings. (See WilmerHale Foreign Corrupt Practices Act Update for March 7, 2005.)

Although the case against Titan is over, the government's enforcement effort against Titan officers, employees and agents appears to be ongoing. In June 2006, the former CEO of Titan Africa, Steven Head, pleaded guilty to one count of falsifying Titan's books and records under the FCPA. According to the government's papers, the Benin agent submitted fictitious fee requests to Head and other Titan employees, and Head authorized the payments knowing that at least a portion would be funneled to the Benin president's 2001 reelection effort. Thereafter, it was alleged, Head and others leveraged the payments to quadruple fees being paid to Titan under its contract with the Benin government.

Head agreed to waive indictment, and the government's papers disclose that prosecutors may move for a reduced sentence based on Head's "substantial assistance . . . in the investigation and prosecution of others." Since Head's plea, the parties have stipulated that sentencing be postponed until the spring of 2007 to allow Head to cooperate further with the government's investigation. These developments, coupled with the fact that the government's papers indicate that Head acted in concert with other unnamed Titan employees and the Benin agent, suggest that the government might well be investigating other individuals in connection with this case.

Tyco Investigation and Agreement

In the spring of 2006, Tyco settled civil charges brought by the SEC for improper accounting, for financial reporting schemes used to deceive investors as to Tyco's performance, and for violations of the FCPA. The FCPA violations stemmed from bribes and other corrupt remuneration paid by Tyco subsidiaries to government officials in Brazil and South Korea.

The SEC alleged that certain improper payments were made to Brazilian government officials by employees or agents of Tyco's Brazilian subsidiary, Earth Tech Brasil. When Tyco acquired Earth Tech Brasil, which engineers water, waste and irrigation systems, Tyco's due diligence suggested that corruption was reputed to be common in Brazil, and that Earth Tech Brasil's lines of business had a reputation for corruption. Yet, according to the SEC's papers, Tyco failed to heed these warning signs and, following the acquisition, Earth Tech Brasil engaged in some form of FCPA-prohibited conduct in up to 60% of its contracts. The SEC alleged that books and paperwork were manipulated to hide these practices, and that these strategies were successful due to internal control deficiencies at Tyco and at Earth Tech Brasil.

The SEC also alleged that in 1999 Tyco conducted due diligence on the acquisition of a South Korean fire protection company, Dong Bang Industrial, and that this review revealed that bribery was common in South Korean government contracting. The SEC alleged that—again ignoring these public corruption "red flags"—Tyco failed to institute tight supervision over Dong Bang's operations, and, as a result, lavish entertainment expenditures and at least one bribe were used to ensure that Dong Bang obtained business from the South Korean government. Furthermore, it was alleged, Dong Bang's records were manipulated to cover up the bribes and entertainment expenditures.

In both instances, Tyco's FCPA violations emerged from inadequacies in its overseas internal controls program, as well as from its failure to recognize the implications of its due diligence findings and possibly to conduct further due diligence mindful of these red flags.

US Presidential Strategy on Combating "Kleptocracy"

On August 10, 2006, in the wake of the government's recent enforcement efforts, the White House unveiled a National Strategy to Internationalize Efforts Against Kleptocracy that seeks to mobilize the international community in addressing, deterring and preventing high-level public corruption. As part of this strategy, the US government has pledged to work bilaterally and multilaterally to immobilize what it calls "kleptocractic" public officials, and to work with international partners—in both the public and private sectors—to deny corrupt officials access to financial safe havens. Notably, the presidential strategy also vows to expand the US government's capacity to investigate and prosecute instances of foreign public corruption, including cases against those who pay or promise to pay bribes to foreign officials, political parties, party officials and candidates for political office. This pledge indicates that FCPA enforcement will remain a top priority for US enforcement authorities.

Practical Lessons

US companies, including those that control foreign subsidiaries, and foreign companies that do any business in the United States or whose shares are traded on US exchanges, should seek to implement a comprehensive FCPA compliance program and to apply that program to their subsidiaries.

The following lessons emerge from these developments:

- Enforcement authorities will continue to vigorously prosecute—and expansively assert jurisdiction when

prosecuting—alleged violations of the FCPA. Thus, foreign-based entities and individuals may be prosecuted for even fleeting contacts with the United States (e.g., phone calls and emails), while US entities and individuals may well face possible prosecution for acts that occur wholly outside the United States.

- When conducting due diligence and other reviews of current or future subsidiaries, it is crucial to follow up on red flags, such as suspicious behavior, transactions or reports, and to document the steps taken and the results thereof. Certain regions with reputations for corruption, including parts of South America, Africa and Asia, continue to present significant FCPA compliance challenges. The establishment of internal FCPA compliance controls is especially urgent in regions where corruption is endemic.

- The FCPA applies to both employees and employers. Individuals engaging in transactions, the supervisors of those engaging in transactions, and the companies benefiting from transactions can all face FCPA liability if their actions are not compliant with the FCPA. The vigilance with which the government recently has initiated enforcement actions against employees and the distinct likelihood of personal liability are worth emphasizing when training employees on the prohibitions and requirements of the FCPA. The possibility of criminal exposure for employees also highlights the importance of taking care in internal investigations to ensure that individuals understand that they may themselves face criminal exposure, and that they are not personally represented by the company's lawyers.

- The negative publicity attendant to the prosecution of an employee for violating the FCPA presents severe reputational risk for companies, even when the company itself is not directly required to answer FCPA charges. For example, press reports discussing the Iraqi translator prosecution discussed the fact that the translator had been a Titan employee, although it appears from the government's papers that the proposed payments were unconnected to his employment. The likelihood of adverse publicity in media outlets when employees violate the FCPA—even when such violations are not connected to the company—further demonstrates the need to educate employees, especially those who work in countries with medium-to-high reputations for official corruption, on the personal consequences of FCPA violations.

- The government continues to use the accounting provisions as a principal focus of FCPA enforcement and as a means to proceed against individuals and companies for problems that have arisen in their controlled foreign affiliates. It remains critical for companies to adopt robust FCPA compliance programs, even when they already have in place outstanding internal controls with respect to domestic operations. Thus, companies must take care to quickly integrate new and far-flung businesses into the larger compliance culture.

FOR MORE INFORMATION ON THESE OR OTHER FCPA ISSUES, PLEASE SEE
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