
FCPA Developments Arising on a Variety of Fronts

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Over the past several months, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have continued announcing significant settlements under the Foreign Corrupt Practices Act (FCPA) at a steady pace. Meanwhile, FCPA-related developments have arisen on a variety of other fronts. Companies are facing possible civil liabilities in private lawsuits for alleged FCPA violations; international developments continue apace, with the Indian government seeking US assistance in its investigation of a Dow Chemical subsidiary; Congress considered and rejected an amendment to the FCPA; the DOJ issued a new opinion under its FCPA Opinion Release Procedure; and more individuals were impacted by FCPA charges. These developments demonstrate the importance to companies of addressing FCPA and other anti-corruption risks in a rapidly evolving global enforcement environment.

Companies Face Private Lawsuits

Companies increasingly face the threat of private litigation as a result of investigations relating to alleged FCPA violations. The FCPA does not provide a private cause of action and therefore only can be enforced by the SEC and DOJ. Private parties, however, have brought suits under RICO and common-law fraud statutes. Aluminum Bahrain BSC (Alba) filed suit against Alcoa, Inc., in the US District Court for the Western District of Pennsylvania on February 27, 2008.

Relying on RICO, common-law claims of fraud, and civil conspiracy to defraud, the civil suit against Alcoa was filed by its long-time customer Alba. Alba alleges that Alcoa overcharged for alumina by \$2 billion over a 15-year period. Alba further claims that the proceeds were sent to companies in Singapore, Switzerland, and the Isles of Guernsey and Jersey, while a portion was used to bribe Bahraini officials and Alba executives to secure more contracts. Three weeks after the suit was filed, DOJ requested a stay of the civil proceedings, while it investigated possible FCPA violations. According to press reports, Bahrain also is conducting its own investigation focusing on Sheikh Isa bin Ali al-Khalifa, former Minister of Petroleum and chairman of Alba, and Victor Dahdahel, Alcoa's agent in Bahrain.

In another development on the private litigation front, lawyers purporting to represent the Republic of Iraq filed a civil suit in the Southern District of New York on June 27, 2008, against 93 companies that allegedly paid kickbacks to the former Hussein regime under the UN's Oil-for-Food Program

(OFFP). Many of the defendants named in the suit have settled FCPA cases with the DOJ and SEC for their payment of kickbacks under the program, and others have disclosed that investigations of those issues are underway. The complaint alleges that the people of Iraq suffered billions of dollars in damages due to the diversion of money to the former Hussein regime, and, more substantially, due to the diversion of the humanitarian goods that were supposed to be delivered to the Iraqi people and the delivery of substandard goods. The complaint also alleges that the United Nations was misled and that the scheme allowed the former Hussein regime to stay in power. The complaint makes a number of claims for relief under various theories, including RICO, in which the enterprise is alleged to consist of the OFFP itself, or, alternatively, the "association in fact enterprise" of the OFFP, the former Hussein regime and the defendants. The RICO count alleges that the racketeering acts included bribery, wire fraud, mail fraud, violations of the Travel Act, and money laundering. Other allegations include commercial bribery in violation of the Robinson Patman Act, fraud, and breach of fiduciary duty for certain defendants. While it is too early to predict the outcome of the litigation, the case is another example of the collateral consequences of corporate bribery allegations.

India to Send Letter Rogatory

According to press reports, India's Central Bureau of Investigation (CBI) plans to send a letter rogatory (formal request for judicial assistance) to US authorities while the CBI investigates Dow Chemical's fifth-tier subsidiary DE-Nocil on bribery charges. CBI's investigation follows the SEC's civil action against Dow as a result of DE-Nocil's FCPA violations. The Indian Ministry of Home Affairs approved CBI's request, and the letter is expected to be sent out shortly. If granted, the letter rogatory will allow CBI to review documents and statements taken during the SEC's investigation.

The SEC filed a settled civil action and a cease and desist order against Dow on February 13, 2007, after Dow voluntarily disclosed to the Commission the findings of an internal investigation of DE-Nocil. The SEC complaint alleged that, between 1996 and 2001, DE-Nocil made an estimated \$200,000 in improper payments to Indian officials—payments which were inaccurately reflected in the company's records. Dow did not admit or deny the allegations but consented to a civil fine of \$325,000. Dow also consented to the cease and desist order, which required the company to comply with the FCPA and prevent further violations.

DE-Nocil is headquartered in Mumbai, India, where it manufactures and markets pesticides used for agricultural purposes throughout India. DE-Nocil employees allegedly bribed Indian officials for approval of three banned pesticides between 1996 and 2001. DE-Nocil directed the improper payments to Central Insecticide Board (CIB) officials, former Ministry of Agriculture advisor RL Razak, and other state regulatory officials. CBI charged Razak and DE-Nocil's former managing director for "commission of offense of bribery, its abetment, criminal misconduct, falsification of accounts, and criminal conspiracy." CBI also brought charges against contractors and consultants allegedly involved. In connection with the criminal prosecution, CBI raided locations in six cities, including the DE-Nocil factory (renamed Dow Agro Sciences India Private Ltd.), the offices of three consultants, and the private homes of those charged.

CBI's criminal investigation of the individuals involved in the DE-Nocil bribery scheme is evidence of

international cooperation in enforcing anti-bribery laws. The bureau's efforts and its proposed letter rogatory show both the increased likelihood of local prosecution in countries often thought not to vigorously enforce anti-corruption laws, and the growing collaboration between countries and cross-border enforcement to discourage the use of bribery and to ensure legal international business transactions. It is also important to note that the catalyst for CBI's investigation was the SEC's complaint.

DOJ Issues Opinion Procedure Release for Halliburton Acquisition

The DOJ reviewed the FCPA Opinion Procedure request of Halliburton and its subsidiaries in a proposed acquisition of publicly traded UK company Expro. Halliburton seeks to acquire Expro prior to completing its FCPA due diligence, due to peculiarities in the UK Takeover Code that prevented it from having adequate time to complete its pre-closing due diligence. Issued on June 13, 2008, the DOJ's Opinion Procedure Release 08-02 requires Halliburton to complete a six-step post-closing plan to avoid liability for any previous FCPA violations committed by Expro.

Halliburton requested the Opinion Procedure Release due to the UK's bidding restrictions. Prior to the request, Expro's board had recommended that its shareholders accept a competitor's bid. UK law only requires the target company to give Halliburton the same information provided to the competitor. Expro is not required to entertain conditional offers by Halliburton, unless the conditions are also imposed by the competitor. Therefore, Halliburton cannot condition its bid on FCPA due diligence. Expro could legally reject a higher conditional bid from Halliburton, in favor of a lower unconditional offer from the competitor.

Halliburton agreed to a number of seemingly onerous conditions to secure Opinion Procedure Release 08-02, which requires Halliburton to automatically fully disclose the results of its due diligence to the DOJ. Halliburton also must submit an extensive FCPA/due diligence work plan within ten days of the acquisition. The work plan spans a period of six months and requires periodic updates to the DOJ. Additional requirements include the following: (1) all Expro employees must sign new employment contracts with Halliburton incorporating FCPA provisions; (2) external counsel and consultants must be retained to conduct due diligence; and (3) within sixty days of closing, employees of Expro must receive FCPA training. Halliburton also agreed not to sell Expro in the event that the DOJ investigates "any conduct by [Expro] or any of its officers, directors, employees, agents, subsidiaries, and affiliates."

If Halliburton complies with the DOJ's procedures, the company will not be held liable for any pre-acquisition violations, or any post-acquisition FCPA violations that occur within the first 180 days. In its Opinion Procedure Release, DOJ recognized that Halliburton did not have time to conduct the appropriate due diligence, nor the legal ability to require remedial measures prior to the closing. The DOJ also stated that the 180-day grace period is unique to Halliburton's specific circumstances and references previous Opinion Procedure Releases that held acquiring companies liable for any corrupt payments made after the date of acquisition.

Opinion Procedure Release 08-02 illustrates the continued presence of FCPA issues in the M&A context, while also demonstrating that the DOJ may be willing, in certain limited circumstances, to

give companies an opportunity to make a purchase and subsequently remedy pre-existing FCPA violations without prosecution. Companies not encountering unique issues such as those Halliburton encountered will still be expected by the DOJ to conduct pre-closing due diligence to the extent feasible in the circumstances.

Willbros Group Enters Deferred Prosecution Agreement

The Willbros Group and its wholly owned subsidiary, Willbros International, entered into a deferred prosecution agreement with the DOJ related to illegal conduct in Nigeria, Ecuador, and Bolivia. The agreement, together with Willbros's settlement with the SEC, requires Willbros to pay nearly \$32 million in total penalties, the second largest set of FCPA penalties to date. Willbros's cooperation with the SEC and DOJ investigations featured prominently in the company's DPA.

The DOJ alleged that, between 2003 and March 2005, Willbros Group and Willbros International paid officials at the Nigerian National Petroleum Corporation, a state-owned oil company, and its subsidiary, National Petroleum Investment Management Services, more than \$6.3 million to obtain a \$387 million contract for construction work on the Eastern Gas Gathering System. Willbros also allegedly made payments to a senior official in the federal government, to a political party, and to officials of a multi-national oil company involved in the project.

The DOJ further alleged that in Ecuador, Willbros paid \$300,000 to government officials of the state-owned oil company, Petroecuador, and its subsidiary, Petrocomercial. In return, Willbros received a \$3 million contract for the Santo Domingo Project, a rehabilitation of a major gas pipeline. Finally, Willbros was charged with tax fraud in Bolivia.

The DOJ filed a six-count criminal information in the US District Court for the Southern District of Texas on May 14, 2008. The six-count information included (1) one count of conspiring to bribe; (2) two substantive FCPA counts for making specific corrupt payments; and (3) three counts of falsifying books and tax fraud. The deferred prosecution agreement requires Willbros to pay a criminal penalty of \$22 million. Willbros's settlement with the SEC requires payment of \$10.3 million in disgorgement of profits and prejudgment interest.

The deferred prosecution agreement includes 13 points describing Willbros' cooperative efforts in investigating and remediating FCPA violations. These steps, which appear to be more extensive than any others described to date by the DOJ or SEC, may explain how Willbros obtained a deferred prosecution in the face of facts that might otherwise have warranted a guilty plea.

In these steps, the company did the following:

- Began investigation within 24 hours of learning of allegations
- Quickly expanded the investigation to other countries and voluntarily reported the results to the DOJ and SEC
- Severed the employment relationship with a senior executive within 10 days of allegations of his involvement
- Took prompt disciplinary action, without regard to rank, against 18 other employees
- Voluntarily agreed to limited waiver of attorney-client privilege with respect to specific matters important to the DOJ

- Promptly terminated relationships with "consultants" based on suspicion of improper activities
 - Acknowledged responsibility
 - Delayed pursuit of civil remedies against individuals so as not to prejudice the DOJ's criminal investigation
 - Promptly reported misconduct of employees, which was a substantial factor in the guilty pleas of two individuals
 - Upon conclusion of the internal investigation, continued to cooperate with the DOJ and SEC, including making numerous current and former employees available for interviews and testimony in the United States and abroad and responding promptly to document requests involving evidence located in remote international locations
 - Expanded and enhanced worldwide legal, accounting, and internal audit functions
 - Issued enhanced stand-alone FCPA policy and conducted worldwide training
 - Retained new senior management with substantial experience and understanding of FCPA requirements
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