PUBLICATION

DOJ FCPA Focus on China, India; Civil Suits Emerge

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Although the Foreign Corrupt Practices Act (FCPA) is more than 30 years old, many companies are not aware of its application to their business abroad or to the fact that the number of cases in the last few years exceeds the total number of cases in the prior 20 years. FCPA enforcement has become such an important topic that it is now one of the top three priorities for the Department of Justice (DOJ). The FCPA antibribery provisions prohibit U.S. companies or their agents from using a payment or the promise of a payment of anything of value to a foreign official, foreign political party or candidate, directly or indirectly, to influence his or her official actions in violation of his or her duty, or to secure improper advantage, e.g. to obtain business, or to induce the person to use his influence to affect official action. Several recent cases are summarized below.

Medical Company Pays $2 Million in Connection with Business in China
AGA Medical Corp. and DOJ recently entered into a deferred prosecution agreement pursuant to which AGA will pay a $2 million penalty, cooperate with the ongoing investigation, implement a compliance program and retain an independent compliance monitor. The criminal information, which will be dismissed if AGA complies with the terms of the agreement, alleges that AGA had made improper payments to Chinese officials while doing business in China. According to the information, payments were made to Chinese patent officials in an effort to obtain approval of their patent applications as well as to state-employed doctors to encourage them to purchase AGA's products. These payments resulted from authorization made by a high-ranking AGA official to the company's distributor.

FARO Technologies Settled with DOJ and SEC on FCPA Claims
FARO Technologies recently voluntarily disclosed to DOJ that its wholly owned Chinese subsidiary had made corrupt payments to Chinese officials of state owned or controlled Chinese businesses. These payments were made at the direction of the regional sales director despite instructions from other FARO officers not to make such payments. In recognition of FARO's self-reporting of the offense, its agreement to pay a penalty of $1.1 million, and its commitment to implement an enhanced compliance program and to engage an independent compliance monitor, DOJ agreed not to prosecute FARO. FARO simultaneously agreed to a cease and desist order to settle SEC's civil enforcement action arising from similar conduct, and will pay $1.85 million in disgorgement of profits and prejudgment interest.

Westinghouse Air Brake Technologies Settles FCPA Claims
The DOJ agreed not to prosecute Westinghouse Air Brake Technologies (Wabtec) with respect to payments Wabtec's Indian subsidiary made to officials of the Indian Railway Regulatory Board. The first set of payments concerned its efforts to win new contracts to supply brake blocks as well as approval of its pricing scheme for current contracts. The second set of payments concerned very small payments, some only $31.50/month, made to officials in order to facilitate scheduling of inspections and issuing compliance certificates. Wabtec agreed not to dispute the DOJ's account of the payments, will pay a penalty of $300,000, and will implement a compliance program aimed at preventing FCPA violations.

Trend Shows Civil Litigation Arising from FCPA Allegations
There has been an increasing trend in favor of parallel civil suits arising from allegations of violations under the FCPA. There have been four primary types of suits. The first concerns shareholder derivative suits. In a recent example, a pension fund sued a company's officers and directors alleging a breach of fiduciary duty because

of the payment of illegal bribes and kickbacks. The second type of suit concerns securities fraud. In connection with the recent enforcement action against FARO Technologies, purchasers of FARO stock sued the company on the grounds that it misrepresented its internal control system by stating that it was adequate to protect against FCPA violations. The purchasers of FARO stock alleged that the recent enforcement action showed that its controls were inadequate, resulting in a preliminary settlement of $6.875 million. The third type of suit concerns foreign governments suing U.S. companies because of illegal payments made. The most recent example is a suit filed by the Republic of Iraq against 91 companies for their roles in paying kickbacks to Saddam Hussein's regime. Finally, suits have also arisen from business partners suing each other over alleged corrupt payments. In one case, a company used such payments to show that its distributor had breached its contract, allowing the company to terminate the distributor relationship.

New Proposed Law Deals with Private Actions in Connection with FCPA Violations
The Foreign Business Bribery Prohibition Act, recently proposed in the House of Representatives, seeks to amend the FCPA to allow issuers of U.S. securities, domestic concerns and other injured persons to seek damages against foreign concerns. Such an action could be brought if a foreign concern used the instrumentalities of interstate commerce to pay a bribe to obtain or retain business while preventing the plaintiff from doing so. The bill is currently in the House Judiciary, Energy and Commerce committees awaiting consideration.

DOJ Releases FCPA Opinion Regarding Acquiror/Successor Liability
Halliburton recently filed for an advisory opinion relating to a proposed bid to acquire a UK public company. Halliburton was concerned that the UK laws regarding bids for public companies did not it allow sufficient time for anti-corruption due diligence and that, since Halliburton had conditioned its bid on such due diligence, it could easily lose the bid to its competitor. The DOJ's remedy to such a situation was to allow a 180-day grace period after the closing of the deal to allow Halliburton to conduct such due diligence and self-report violations to DOJ without these steps resulting in prosecution of Halliburton. In return, Halliburton had to agree to impose a strict post-acquisition due diligence and integration plan described in the opinion. It is important to note that, while this decision does provide significant insight into the DOJ's interpretation of the FCPA, the specific terms of this opinion apply only to Halliburton's proposed deal. Companies in similar situations should submit their own request for an advisory opinion to the DOJ.