Marubeni Settlement Illustrates Broad Reach of the FCPA

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On January 17th, Marubeni Corp., a Japanese trading company, paid $54.6 million to settle an investigation related to the Foreign Corrupt Practices Act (FCPA). The government's investigation of Marubeni grew out of the lengthy investigation it conducted of the TSKJ joint venture's bribery of Nigerian officials to win contracts to build liquefied natural gas facilities on Bonny Island, Nigeria. TSKJ hired Marubeni to pay off low-level Nigerian officials. The four companies comprising the TSKJ joint venture – Technip S.A., Snamprogetti Netherlands B.V., Kellogg, Brown and Root, Inc., and JGC Corporation, agreed to pay over $1.5 billion in earlier settlements with the government. In addition, three individuals previously pleaded guilty to FCPA charges in connection with the investigation.

In addition to the $54.6 million payment, Marubeni agreed to institute a corporate compliance program and to engage a corporate compliance consultant for a two year period.

The Marubeni settlement is noteworthy for at least two reasons. First, it underscores the government's continued vigor in bringing FCPA actions. Second, it illustrates the FCPA's formidable reach. Marubeni is a Japanese corporation (while it has a U.S. based subsidiary, that company was not a party to the case). All of its actions in connection with this case occurred outside of the United States. Nonetheless, it was liable as an agent of a "domestic concern," namely Kellogg, Brown and Root, and an agent of an "issuer," Technip, since those two companies were members of the TSKJ joint venture.

In recent years, the Department of Justice (DOJ or Justice Department) has stepped up enforcement of the FCPA, levying large fines and jail time to individuals and companies who violate the Act. In a May 2010 speech, U.S. Attorney General Eric Holder told the Organization for Economic Cooperation and Development Convention that combating corruption is one of the "highest priorities" of the Justice Department. He also stated that prosecuting individuals would be a cornerstone of the enforcement strategy to deter companies from thinking that they could simply pay a fine as a cost of doing business. Recent activity by the Justice Department confirm the Attorney General's statements.

2011 saw the second highest number of FCPA related actions ever, with the DOJ initiating twenty-three enforcement actions and the Securities and Exchange Commission (SEC) initiating twenty-five. 2011 was second only to 2010 where the DOJ initiated an enormous forty-eight enforcement actions as well as twenty-six from the SEC. Since 2008, the government has had approximately 150 FCPA investigations going on at any one time. Settling these investigations has been quite costly. Besides the January settlement by Marubeni, other prominent companies have also recently settled claims related to the FCPA, including Siemens AG ($1.6 billion to settle with the Justice Department, SEC,

and the Munich Public Prosecutor's Office), BAE Systems PLC ($400 million criminal fine), Kellogg, Brown & Root LLC ($402 million criminal fine), and Johnson & Johnson ($70 million to the Department of Justice and SEC).

Because of the stepped up enforcement and the large associated penalties for failing to comply with the FCPA, it is increasingly important that businesses take proactive measures to ensure compliance with the Act.

The General Purpose and Provisions of the FCPA

The FCPA was enacted in 1977 when, during an SEC investigation, over 400 U.S. companies admitted making questionable or illegal payments to foreign government officials, politicians, and political parties. The FCPA was little-used for quite some time. But that has radically changed.

The FCPA has two main prongs: one associated with antibribery, and the other with accounting requirements for certain entities. The antibribery provisions basically make it unlawful to bribe foreign government officials to obtain or retain business. The provisions are sweeping and prohibit companies from making "corrupt payments," or bribes, to foreign officials that are intended to help the company obtain or retain business.

The accounting requirements are basically a complement to the antibribery provisions and require that certain companies, including those whose stock is listed on a U.S. stock exchange, comply with various accounting provisions. The accounting provisions make it difficult for companies to disguise the nature of payments that they make to foreign officials, thus making it difficult to make corrupt payments appear legitimate.

Who is Potentially Liable Under the FCPA

The FCPA has tremendous breadth and potentially applies to any individual, firm, officer, director, employee, or agent of a firm and any stockholder acting on behalf of a firm.

The statute specifically applies to "issuers" and "domestic concerns." An "issuer" is a corporation that has issued securities that have been registered in the United States or who is required to file periodic reports with the SEC. A "domestic concern" is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States. A U.S. parent corporation may also be held liable for the acts of foreign subsidiaries where the parent company authorized or otherwise controlled the activity in question. As the Marubeni settlement indicates, agents of domestic concerns and issuers may also be held liable.

In addition to "issuers" and "domestic concerns," the Act also applies to any person, including a non-U.S. person or corporation, who commits an act in furtherance of a bribe or prohibited act while in the United States or its territories. Thus, even foreign nationals can be liable under the FCPA if they commit the prohibited act while in the U.S. or its territories.

The FCPA also applies to persons or companies who hire third parties to make the corrupt payments on their behalf, provided the hiring person has knowledge that the third-party intends to make such a payment. The term "knowing" includes conscious disregard and deliberate ignorance. Thus, a U.S. company or other covered person who hires a foreign national to make bribes on its behalf, even if the foreign national never set foot inside the U.S. or its territories, could still be liable under

the FCPA.

What Constitutes a Bribe

In order to be found liable under the FCPA the bribing entity must be found to have a “corrupt intent.” The intent must be for a business purpose, i.e., for the purpose of obtaining or retaining business. The Department of Justice interprets “obtaining or retaining business” broadly, such that the term encompasses more than the mere award or renewal of a contract. Additionally, the business relationship sought does not have to be with the foreign government or foreign government instrumentality to which the bribe was given. So long as the intent was to obtain or retain any business it is covered by the Act. Finally, intent and knowledge may often be inferred from the fact that a bribe took place, and “knowledge” includes deliberate indifference and willful ignorance.

Payment under the FCPA is also broadly interpreted. Importantly, a payment need not actually be made in order for the Act to be violated. An offer or promise to pay or the authorization for another to make a payment is enough to violate the Act. Additionally payment need not be in currency as the statute specially notes that payment can be money or anything of value, including real estate, stocks, vacations and home improvements.

In order to violate the FCPA, the bribe must be made to a foreign official, a foreign political party or party official, or any candidate for foreign political office. “Foreign official” is broadly defined and includes any officer or employee of a foreign government, a public international organization (such as the World Bank and United Nations), any person acting in an official capacity or any relatives or close family/household members of any of the above listed. Companies doing business overseas must be careful when determining who is a foreign official as many foreign countries’ governments run hospitals, banks, utilities and other enterprises that are privately run in their home countries.

Exceptions to the FCPA

The FCPA allows exceptions to payments for “facilitating payments” for routine governmental actions. Some examples would be actions such as obtaining permits, licenses or other documents; processing governmental papers such as visas and work orders; providing police protection, mail pick-up and delivery; and providing phone service and power and water supply. However, use of facilitating payments may not be worth the risk.

A facilitating payment may constitute a bribe in the country where the payment is made, thus potentially opening up the payer to liability in that country. Additionally, facilitating payments must be closely recorded on the company’s books, thus potentially leaving a financial record of violations of the host countries' laws. Finally, it may not be advisable to let an employee on the ground determine whether a payment is a facilitating payment or a bribe, since a mistake could subject the company to large criminal fines.

Another exception to the FCPA is the affirmative defense that the payment was legal under the written law of the foreign official’s country. Because the local law exception is an affirmative defense, the burden is on the company that made the payment to show its legality.

Compliance with the FCPA

One of the most important steps towards compliance is awareness, both that the DOJ is stepping up enforcement of the Act, as well as awareness of the risks a company may face. Compliance efforts must begin from the top-down, and must include awareness that the excuse “in order to do business

in (insert country) you have to pay bribes," is no longer acceptable. A strong corporate culture of compliance with the FCPA may be the single most important step towards ensuring compliance.

All companies who engage in international business should implement an FCPA compliance program, which should be in writing. The program must stay current, should be regularly audited, and should include a training program for executives and employees alike. Training is particularly important before traveling overseas to conduct business or before an employee is posted in an overseas assignment. In tandem with the compliance program, a risk assessment of the high-risk areas of the business should be conducted. A company's risk may be increased by both the nature of business, such as competing for government contracts, as well as the particular country in which business is being conducted, as bribery is more prevalent in certain countries. Information gleaned from such risk assessment may prove helpful in gearing the compliance program towards the particular risks associated with a particular business.

Written agreements with foreign intermediaries, agents, vendors, and sub-contractors should all contain a provision that they are aware of and agree to follow the provisions of the FCPA. Some companies in particular high-risk areas may want to also require such vendors and contractors to submit to audits. The ability to conduct such an audit may allow the company to detect any potential violations of the FCPA before an enforcement agency and take remedial actions.

In addition to the ability to audit intermediaries, companies should implement accounting techniques and internal expenditure controls that clearly and accurately document all foreign expenditures. Again, the books and records should be maintained in such a fashion that the company can conduct an internal international audit to discover potential violations of the FCPA before an enforcing entity.

Finally, prior to making any potentially questionable payments to foreign officials, the company should consult with counsel about potential FCPA liability. Such diligence may have been unnecessary in days past. However, the new focus on enforcement makes such diligence necessary to avoid potential hefty fines and jail time for individuals and companies alike.

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