

To: Our Clients and Friends

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Enforcement International: the Anti-Bribery Hot Water Just Keeps Getting Hotter

Dramatic developments in anti-bribery law enforcement continue—and more are certain to follow in 2011 and beyond. US and foreign companies would do well to step up training, monitoring, and other compliance activities to protect themselves and their officials and employees from the severe penalties that may result from violations or perhaps even the mere pressure of a government investigation or enforcement proceeding.

In the US, the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) have been aggressively enforcing a broad interpretation of the Foreign Corrupt Practices Act of 1977 (FCPA). Following on 2008 and 2009 FCPA enforcement settlements totaling billions of dollars (*e.g.*, Halliburton/Kellogg Brown & Root and Siemens), the US government last month announced large enforcement settlements with Swiss freight-forwarding and logistics company Panalpina and a number of that company's subsidiaries and US and foreign customers in the oil-services industry. These settlements involve almost \$250 million in criminal fines, civil penalties, civil disgorgement, and interest; and agreement by Panalpina to cease business entirely in three countries deemed to pose substantial anti-corruption compliance risks.

Meanwhile, US agencies are under fire for not pursuing FCPA violations aggressively enough. US Senator Arlen Specter, chair of the Senate Judiciary Committee's Crime and Drugs subcommittee, complained that DOJ is relying too heavily on fines in large-scale FCPA prosecutions and sending too few corporate officials to prison. Nevertheless, imprisonment is a major risk. This month, for example, a septuagenarian UK citizen extradited from the UK pleaded guilty to conspiracy to violate the FCPA. A former officer of and consultant to a UK Kellogg Brown & Root subsidiary, he will forfeit more than \$700,000 and potentially face five years in prison on sentencing. (His co-defendant, another UK citizen, is still fighting extradition.) In April, a US citizen was sentenced to over seven years' imprisonment for FCPA violations.

Significantly, the US trend seems toward increased focus on foreign companies, on the activities of US and foreign companies' agents (*e.g.*, logistics providers), on multi-spoked relationships between players in industry sectors or sub-sectors (*e.g.*, energy), and on books-and-records (accounting) violations as well as bribery violations. Critics of FCPA enforcement practice have pointed out that the legal regime has been shaped largely by settlements and guilty pleas rather than considered judicial development of the law—for example, the government's theory that it had jurisdiction over Panalpina, a Swiss company, solely because the bribes were paid on behalf of its US customers is questionable as a matter of fact and untested as a matter of law. Critics have also asked whether the FCPA is being used as an unauthorized economic sanctions program (*e.g.*, the requirement that Panalpina quit several countries considered corruption risks), and complained that the government has not provided sufficient guidance as to how companies may steer clear of violations.

In the UK, anti-corruption enforcement will likely be remade and radically increased by the Bribery Act 2010. (See IRB No. 463.) Unlike the FCPA, the Bribery Act does not exempt so-called “facilitating payments” (payments made to secure routine governmental action), and may therefore create significant difficulty for companies used to operating under the FCPA exemption. The Bribery Act also includes a new prohibition on a company’s failure to prevent bribery by associates (*e.g.*, agents, employees, and subsidiaries).

Together with its increase in maximum prison terms and elimination of any ceiling on fines, the Bribery Act may portend as onerous an enforcement regime in the UK as exists in the US. Companies large and small—and their officers and other employees—should place anti-corruption compliance review at the top of their New Year’s resolution lists.

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