The SFO Speaks in the Mabey & Johnson Case: Private Equity - Are You Listening?

As reported by thebriberyact.com, on January 13, 2012, the UK Serious Fraud Office (SFO) announced the final piece of the Mabey & Johnson (M&J) case, in which the company's sole shareholder Mabey Engineering (Holdings) Limited agreed to pay back dividends gained as a result of corruption of M&J obtain Iraqi bridge-building contracts. SFO Director Richard Alderman lauded it as "the final act in an exemplary model of corporate self-reporting and co-operative resolution". I hope that every compliance officer of a private equity company read the report by the Bribery Act guys because this is a remedy which may soon be aimed directly at your company.

To recap this case, as reported in the SFO Press Release, entitled "*Shareholder agrees civil recovery by SFO in Mabey & Johnson*", said that M&J has worked with the SFO since the beginning of 2008 when M&J self-reported certain instances of corruption it had identified as a result of an internal investigation. Following the self-disclosure and subsequent co-operation with the SFO's investigations, the company pled guilty to charges of corruption and breaches of United Nations sanctions and was convicted at Southwark Crown Court in September 2009. Since the self-disclosure, the company has introduced new management, implemented anti-bribery and corruption procedures and appointed an independent monitor. The SFO noted that "the company is viewed by the SFO as having conducted itself in an exemplary way through its self-referral, extensive co-operation with the authorities and the transformation of the company."

However, there is now one additional remedy that the SFO used against M&J. The sole shareholder of M&J, Mabey Engineering, agreed to pay a penalty of £131,201 under the Proceeds of Crime Act. The sum represents the dividends which the parent company collected from the contracts at the center of the UN Sanctions prosecutions. The company will also pay costs in the amount of £2,440.

Director Alderman is quoted as saying:

"There are two key messages I would like to highlight. First, shareholders who receive the proceeds of crime can expect civil action against them to recover the money. The SFO will pursue this approach vigorously. In this particular case, however, the shareholder was totally unaware of any inappropriate behaviour. The company and the various stakeholders across the group have worked very constructively with the SFO to resolve the situation, and we are very happy to acknowledge this.

The second, broader point is that shareholders and investors in companies are obliged to satisfy themselves with the business practices of the companies they invest in. This is very important and we cannot emphasise it enough. It is particularly so for institutional investors who have the knowledge and expertise to do it. The SFO intends to use the civil recovery process to pursue investors who have benefitted from illegal activity. Where issues arise, we will be much less sympathetic to institutional investors whose due diligence has clearly been lax in this respect."

Commenting on these statements, thebriberyact.com said, that with these remarks, Director Alderman "took the opportunity to fire a warning a shot across the bows of institutional shareholders and the higher standards the SFO will expect of them". I usually do not disagree with thebriberyact.com guys. However, here I think they were way too subtle, because even if a shareholder did not know about illegal conduct, the SFO will go after the proceeds of the criminal activity. This is not the situation where a recalcitrant company agrees to disgorge profits, which is a standard Securities and Exchange Commission (SEC) remedy. This is a situation where a shareholder who received dividends was required to return its money.

Director Alderman goes on to imply that institutional shareholders will be held to a higher standard. The "broader point is that shareholders and investors in companies are obliged to satisfy themselves with the business practices of the companies they invest in. ***This is very important and we cannot emphasise it enough.***" Think about that statement for a minute. If you are a private US equity company, with a UK portfolio company which sustains a Bribery Act violation and prosecution, you may well have to return profits, even where you did not have knowledge of the violative conduct.

More importantly for private US equity companies, how long do you think it will take for the Department of Justice (DOJ) to incorporate this form of remedy into a Foreign Corrupt Practices Act (FCPA) enforcement action? I can give you the answer; ***NOT LONG***. The SEC enforces the books and records component of the FCPA against publicly listed companies. Most equity companies are privately held so profit disgorgement may not be available in an enforcement action against a portfolio company. Nevertheless, based on the Mabey case, the DOJ may well seek return of dividends, profits or other monies which went from a portfolio company to its private equity owner.

Over the past week, there has been intense media discussion regarding private equity due to the GOP primary. These discussions have even reached the FCPA compliance *commentariati* with an article by Matt Ellis, writing in his blog FCPAméricas, entitled "*Mitt Romney, Private Equity, and the FCPA*." The lawyers at the DOJ read the papers like everyone else and they see this increased scrutiny and this scrutiny, coupled with this new development by the SFO, will put this type of enforcement remedy squarely in front of US regulators. If you are a private equity company, you need to heed Director Alderman's warning that "***This is very important and we cannot emphasise it enough";*** you will be "obligated to satisfy [yourself] with the business practices of the companies [you] invest in." It does not get any more straight forward than that.