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Expanding Enforcement: SEC Charges Non-U.S. Issuer with FCPA Violations in Historic Case

Introduction

Over the past several years, the U.S. government has steadily stretched the jurisdictional reach and scope of the U.S. Foreign Corrupt Practices Act (FCPA) in a concerted effort to crack down on corrupt business practices through increased enforcement. In particular, the U.S. Department of Justice (DOJ) has aggressively used aiding and abetting and conspiracy theories to charge individuals and companies who previously appeared beyond the reach of the FCPA. Using a similarly aggressive approach, the Securities and Exchange Commission (SEC) recently broke previously uncharted territory by charging a non-U.S. issuer with FCPA violations, representing a dramatic and novel expansion of the SEC's enforcement authority under the FCPA.

FCPA Accounting Provisions Apply to "Issuers"

The FCPA makes it a federal criminal offense for any U.S. person, issuer or domestic concern, or any foreign person while in the United States, directly or indirectly, to make a corrupt payment to any foreign government official to obtain or retain any business advantage (the "anti-bribery provisions"). The FCPA also requires companies with certain securities registered under the Securities Exchange Act of 1934 to make and keep appropriate books and records and to maintain a system of adequate internal controls (the "accounting provisions"). Thus, under the statute, the FCPA's accounting provisions apply only to "issuers" -- *i.e.*, companies that have securities registered with the SEC, trade their shares on a U.S. exchange, or otherwise file reports with the SEC.

DOJ and SEC Settles FCPA Charges with Panalpina, Inc.

On November 4, 2010, the DOJ and the SEC announced settlements totaling \$236.5 million in connection with FCPA charges against seven companies -- the most companies ever to simultaneously settle FCPA violations in a single day. U.S.-based Panalpina, Inc. and its parent Panalpina World Transport (Holding) Ltd., a Swiss freight forwarding company, were charged with violations along with several of their customers operating in the oil and gas sector. The charges against Panalpina, Inc. arose from thousands of alleged bribes totaling \$27 million paid to obtain customs clearance in at least seven nations, including Angola, Azerbaijan, Brazil, Kazakhstan, Nigeria, Russia and Turkmenistan from 2002-2007. In their settlement with the DOJ, Panalpina, Inc. and its parent agreed to pay a combined fine of \$70.5 million for their FCPA violations.

Although Panalpina, Inc. is not an issuer and therefore has no direct obligation to comply with the accounting provisions of the FCPA, the SEC nevertheless charged Panalpina, Inc. with aiding and abetting its customers with their violations of the books and records provisions. The SEC based its jurisdiction over Panalpina, Inc. on the theory that it was acting as an agent of customers that are

U.S. issuers (who are subject to the accounting provisions). In a separate settlement with the SEC, Panalpina, Inc. agreed to pay \$11.3 million in disgorgement of profits it derived from the bribery scheme.

International Companies Must Comply with All Provisions of the FCPA

The SEC's unprecedented case against a non-U.S. issuer like Panalpina, Inc. is a significant development in FCPA enforcement. The Panalpina, Inc. case strongly indicates that the SEC's recently created FCPA Unit plans to follow the DOJ's lead in finding new and aggressive ways to bring FCPA charges where such charges had previously appeared unlikely, if not impossible. This development, in conjunction with the U.S. government's continued focus on heightened anti-corruption enforcement generally, contributes further to the urgency with which international companies -- including those that are not directly subject to the FCPA -- should assure that their business practices are FCPA compliant.

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