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■ JULY 30, 2007

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The Increasing FCPA Compliance Risks of Obtaining Government Licenses, Permits, and Certifications

Published in the *Wisconsin Law Journal* on August 27, 2007.

A common misperception is that the anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA) apply only to improper payments to secure foreign government contracts or business. However, recent FCPA enforcement actions clearly evidence that how a company obtains various foreign government licenses, permits, and certifications (all of which may be required before a company can begin doing business, or continue to do business, in a foreign jurisdiction regardless of customer base) will be subject to close scrutiny by U.S. government regulators charged with enforcing the FCPA. This FCPA client alert details this increasing FCPA compliance risk.

The FCPA contains two sets of provisions, the anti-bribery provisions and the books and records and internal control provisions. In general, the anti-bribery provisions prohibit payment, offering, or authorization of payment of money, a gift, or "anything of value" to a "foreign official" or foreign political party for purposes of influencing any act or decision or securing any improper advantage in order to assist the payor in "obtaining or retaining" business.¹ The books and records and internal control provisions generally require issuers (companies that have a class of securities registered with the U.S. Securities and Exchange Commission (SEC) or who are required to file periodic reports with the SEC) to: (i) make and keep books, records and accounts that, in reasonable detail, accurately and fairly reflect transactions and the disposition of the issuer's assets; and (ii) devise and maintain a system of internal accounting controls to maintain accountability of assets.² All U.S. companies — both public and private — as well as foreign issuers are subject to the FCPA's anti-bribery provisions and proof of a U.S. territorial nexus is not required for the FCPA to be implicated and FCPA violations can, and usually do, occur even if the improper activity takes place entirely outside of the United States.³

The FCPA compliance risks associated with securing government licenses, permits, or certifications concerns the "obtain or retain business" element of an FCPA anti-bribery violation. The scope of this broad element was in flux and subject to much debate until

¹ 15 U.S.C. § 78dd-1 et seq.

² 15 U.S.C. § 78m(b).

³ 15 U.S.C. §§ 78dd-1(g), 78dd-2(i).

United States v. Kay, 359 F.3d 738 (5th Cir. 2004) in which the court held that there was little difference between making an improper payment to a foreign official to award a government contract and an improper payment to a foreign official to secure a general improper advantage over competitors. Since the *Kay* decision, there have been several FCPA enforcement matters where the improper payment to a foreign official was not alleged to have influenced any government contract or business, but rather to have provided the company a general improper advantage in a foreign country, including securing government licenses, permits, or certifications necessary to conduct business in the foreign jurisdiction.

Delta & Pine Land Co.

Most recently, in July 2007, Delta & Pine Land Company (Delta & Pine), a Mississippi-based seed producer and marketer, along with its wholly owned subsidiary, Turk Deltapine, Inc. (Turk Deltapine), agreed to settle an FCPA enforcement action for making approximately \$43,000 in improper payments between 2001–2006 to officials of the Turkish Ministry of Agricultural and Rural Affairs (MOA) in order to obtain various governmental reports and certifications needed to obtain, retain, and operate its business in Turkey.⁴ According to the SEC, payments were made to the MOA officials even though they did not actually engage in required activity necessary to complete various inspection reports and did not comply with regulations in issuing various certifications for the product.⁵ The SEC further alleged that Delta & Pine executives in the United States become aware of the payments to the MOA officials, but instead of stopping the payments, allowed Turk Deltapine to continue making the payments indirectly through a third party supplier via an inflated invoice scheme.⁶ (Improper payments made indirectly through others also are improper under the FCPA given its broad third-party payment provision in which a company may not funnel improper payments indirectly through others.⁷) Because payments to the MOA officials were not recorded in the books, records, and accounts of the company or, if recorded, were falsely described as “porter fees,” the SEC also found that Delta & Pine violated the FCPA’s books and records and internal controls provisions.⁸

⁴ See SEC Litigation Release No. 20214 (July 26, 2007), SEC Release No. 5613 8 (July 26, 2007), SEC v. Delta & Pine Land Co., 1:07-cv-01352 (July 25, 2007, D.D.C.).

⁵ See SEC v. Delta & Pine Land Co., 1:07-cv-01352 (July 25, 2007, D.D.C.).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

Based upon the above improper conduct, Delta & Pine (which has since been acquired by Monsanto Company) agreed to pay a \$300,000 civil penalty and engage an independent compliance monitor (an increasing trend in FCPA enforcement actions) to review and evaluate its FCPA compliance policies and procedures.⁹

The Dow Chemical Co.

The Delta & Pine FCPA enforcement action closely follows and resembles the February 2007 enforcement action against The Dow Chemical Co. (Dow) which, along with its subsidiary, DE-Nocil Crop Protection Ltd. (DE-Nocil), agreed to settle FCPA charges that it made approximately \$200,000 in improper payments and gifts to officials of the Indian Central Insecticides Board and other agricultural regulatory officials in India who had discretionary authority in registering and inspecting company product for sale in India.¹⁰ The improper payments to the Indian officials (which were made without knowledge or approval of any Dow employee in the United States) were made by DE-Nocil through the use of consultants and unrelated companies and via false invoices and fictitious charges on bills to DE-Nocil, none of which were properly recorded on the books and records of the company.¹¹

Based upon the above improper conduct, Dow agreed to pay a \$325,000 civil penalty.¹²

A New Area of FCPA Compliance

The Delta & Pine and Dow enforcement actions clearly show that U.S. enforcement agencies will not hesitate to bring FCPA enforcement actions where an improper payment to a foreign official allows a company to obtain various foreign government licenses, permits, and certifications. For this reason, business leaders should review their FCPA compliance checklist and be alert to the FCPA compliance risks associated with what would otherwise be viewed as a mundane business matter.

At a minimum, business leaders should think about the following issues to ensure that the company does not run afoul of the FCPA in securing various foreign government licenses, permits, and certifications:

- Are the various licenses, permits, or certifications legally required in the foreign jurisdiction or is the need for such approvals being fabricated by a foreign official seeking to extract an improper payment?

⁹ See SEC Litigation Release No. 20214 (July 26, 2007).

¹⁰ See SEC Litigation Release No. 20000 (Feb. 13, 2007), SEC Release No. 55281 (Feb. 13, 2007), SEC v. The Dow Chemical Company, 1:07-cv-00336 (Feb. 13, 2007, D.D.C.).

¹¹ See SEC v. The Dow Chemical Company, 1:07-cv-00336 (Feb. 13, 2007, D.D.C.).

¹² *Id.*

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- How is the company obtaining the required licenses, permits, or certifications? Is a third party involved? If so, what does the company know about the third party? Has FCPA due diligence been done? Is there a written agreement with the third party concerning scope of services and does it contain an FCPA acknowledgment and FCPA representations and warranties?
- If the company is obtaining the required licenses, permits, or certifications directly from the issuing agency, who at the company is interacting with the foreign officials? Are there any ethical concerns with this employee? Does this employee's reimbursement requests contain any unusual requests?
- Is payment being made directly to the licensing agency or to the individual foreign official, in which case it is immediately suspect? Does the company obtain an invoice and supporting documentation from the licensing agency?
- Is the company accurately and completely describing the nature of the expenses on its books and records?

Given the emergence of this new FCPA compliance risk and because of the recent FCPA enforcement activity in this area, all companies would be wise to amend their FCPA compliance policies and procedures and audit protocols to include a review of how the company obtains various foreign government licenses, permits, and certifications that may be required before a company can begin doing business, or continue to do business, in a foreign jurisdiction regardless of customer base.