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Recent FCPA and Anti-Corruption News Highlights the Ever-Growing Importance of Effective FCPA Compliance Programs

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There has been a flurry of important Foreign Corrupt Practices Act (FCPA) and other anti-corruption enforcement news in recent days. All the trends we identified in recent alerts and Proskauer's International Practice Guide[1] can be observed in this enforcement activity, including:

- Increased enforcement activity by U.S. authorities continues. Last year was the fourth in the past five years that the Department of Justice (DOJ) and Securities and Exchange Commission (SEC)—the FCPA's enforcers—set a record by instituting more FCPA enforcement proceedings and prosecutions than in any prior year since the law's enactment in 1977.[2] With announced industry-wide probes by the DOJ, including one into the pharmaceutical and medical device industries,[3] as well as the substantial resources that the FBI and the SEC recently dedicated to FCPA enforcement,[4] this upward trend is likely to continue.
- The U.S. Government is continuing to secure enormous settlements from corporate FCPA violators. On April 1, 2010, the DOJ announced that German automobile manufacturer Diamler, A.G. agreed to pay $185 million in criminal and civil penalties to resolve FCPA charges following a lengthy investigation into the company's and three of its subsidiaries' alleged payment of bribes in twenty-two countries world-wide. Daimler and one of the subsidiaries entered into deferred prosecution agreements with the DOJ, and the other two subsidiaries pled guilty to criminal charges. As part of the deal, former FBI Director and Judge Louis Freeh will serve as the company's independent compliance monitor for the next three years. [5] Remarkably, the penalties that Daimler was required to pay could have been much worse, but for the DOJ's leniency in light of the company's remedial efforts and cooperation with U.S. regulators.
- Individual FCPA violators are receiving harsher prison sentences. On April 19, 2010, a federal court in Virginia handed down a whopping 87-month sentence—the longest prison term ever imposed for an FCPA violation—to a defendant who pled guilty to paying just $200,000 in bribes to Panamanian government officials over a

number of years to secure maritime contracts and to making a false statement to federal agents.[6]

- Other nations are stepping up their efforts to root out graft and corruption. On April 8, 2010, the United Kingdom enacted the Bribery Act of 2010 ("Bribery Act") that, in certain key respects, is even more stringent than the FCPA:
  - Whereas the FCPA applies only to bribery of "foreign officials," the Bribery Act proscribes private commercial bribery in addition to bribery of foreign public officials.[7]
  - Further, the Bribery Act imposes strict liability on companies for "failing to prevent bribery" by employees, agents, and subsidiaries. The only available defense to such a charge is that the company had adequate procedures that were designed to prevent the bribery.[8]
  - The Act also contains no exemptions for bona fide business expenses and facilitation (or "grease") payments, which are permissible under the FCPA's anti-bribery provisions.[9]
- Cross-border cooperation between foreign nations in enforcing anti-bribery provisions is continuing and proving effective. For instance, on April 14, 2010, Russian investigators raided the Moscow offices of Hewlett-Packard Co. at the request of German authorities, who are investigating whether H-P executives paid bribes to win a contract to sell computer equipment to the office of the prosecutor general of the Russian Federation. The German investigation in Moscow is part of a larger, on-going probe by German authorities into potential bribery by H-P around the globe.
- Meaningful FCPA compliance programs help mitigate the exposure faced by companies that encounter unexpected FCPA problems. In addition to the leniency that Daimler received because of its remedial efforts, and the defense under the Bribery Act, a recent decision by a Delaware court dismissing a shareholder derivative suit reflects the benefits of having an effective anti-corruption compliance program. The plaintiffs there alleged that Dow Chemical's Board of Directors had breached fiduciary duties by failing to detect and prevent bribery in connection with a joint venture in Kuwait. The court rejected the claims, finding the plaintiffs had not established a failure of supervision or bad faith by the Board, in part, because the Board had installed policies and procedures that expressly prohibited improper payments to third parties.

These recent events confirm that harsh penalties, substantial coordination and cooperation between and among foreign governments, and strict anti-bribery laws across the globe will continue to define the future of anti-corruption enforcement in the U.S. and abroad. The good news is that FCPA compliance programs can help companies avoid trouble by preventing violations in the first instance, and by mitigating sanctions and penalties in the unfortunate situation where an FCPA problem arises. In this day and age of hyper-aggressive global enforcement of the FCPA and other anti-corruption laws, devising and maintaining an effective compliance program could not be more important.

[1] http://www.proskauerguide.com/trends_report/chapter_six/toc

[2] Lanny A. Breuer, Asst. Att'y Gen., U.S. Dep't of Justice, Prepared Address to the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009), at *1, http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf.

[3] *Id.*at *5.

[4] Lanny A. Breuer, Asst. Att'y Gen., U.S. Dep't of Justice, Prepared Keynote Address to the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum (Nov. 12, 2009), at *1, http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-12-09breuer-pharmaspeech.pdf.; *see also* Speech by SEC Staff: Remarks at News Conference Announcing New SEC Leaders in Enforcement Division (Jan. 13, 2010), http://www.sec.gov/ news/2010/spch011310newsconf. htm.

[5] Press Release, U.S. Department of Justice, *Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay $93.6 Million in Criminal Penalties* (Apr. 1, 2010), http://www.justice.gov/opa/pr/2010/April/10-crm-360.html; *see also* Press Release, Daimler, A.G., *Daimler AG Reaches Settlement with U.S. Securities and Exchange Commission (SEC) and Department of Justice (DOJ)*, (Apr. 1, 2010), http://www.daimler.com/Projects/c2c/channel/documents/1824932_IRRelease_e.pdf.

[6] www.justice.gov/opa/pr/2010/April/10-crm-442.html.

[7] *See* Bribery Act 2010, §§ 1-2, 6, http://www.opsi.gov.uk/acts/acts2010/ukpga_20100023_en_1.

[8] *See* Bribery Act 2010, § 7(1)-(2), http://www.opsi.gov.uk/acts/acts2010/ukpga_20100023_en_1. In contrast, the FCPA's formal statutory language requires proof of knowledge (which may be met by a showing of willful blindness). That being said, one might argue that the DOJ and the SEC act as if the FCPA contained a strict liability standard.

[9] *See* 15 U.S.C. § 78dd-1(c)(2); 15 U.S.C. § 78dd-1(f)(3).