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This newsletter is designed to highlight new issues of importance in international trade and business related law. We hope you will find it interesting and welcome your comments.

For more information, feel free to contact any of the lawyers who wrote or are quoted in these articles, or one of the co-chairs of our International Trade and Business Group:

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"...the recent plea agreement involving Calgary-based Griffiths Energy International Inc. creates some uncertainty regarding the effect of self-reporting, cooperation, and the implementation of anti-corruption compliance programs on [Corruption of Foreign Public Officials Act] penalties."

RECENT CORRUPTION OF FOREIGN PUBLIC OFFICIALS CASE SENDS MIXED MESSAGE TO CANADIAN COMPANIES

Henry J. Chang

Overview

In the United States, both the Department of Justice and the Securities and Exchange Commission place a premium on the self-reporting of U.S. *Foreign Corrupt Practices Act*[1] ("FCPA") violations, cooperation with the authorities, and the implementation of an effective anti-corruption compliance program. Companies that self-report, cooperate, and implement effective anti-corruption compliance programs will often avoid criminal sanctions or benefit from lower fines.

It has been assumed that Canadian authorities will also take this conduct into consideration when prosecuting cases under the Canadian *Corruption of Foreign Public Officials Act*[2] ("CFPOA") and reward cooperating companies through a reduction in the penalties that they might otherwise face. However, the recent plea agreement involving Calgary-based Griffiths Energy International Inc. ("Griffiths Energy") creates some uncertainty regarding the effect of self-reporting, cooperation, and the implementation of anti-corruption compliance programs on CFPOA penalties.

The Griffiths Energy Case

On January 22, 2013, Griffiths Energy pleaded guilty to bribery charges under the CFPOA. The charges arose from payments made to a company controlled by the wife of Chad's Ambassador to Canada, which were made by Griffiths Energy in connection with its attempt to secure oil and gas leases in Africa.

The payment was discovered after the founder of Griffiths Energy died in a boating accident and a new slate of executives was appointed. After an internal review, Griffiths Energy reported its findings to the RCMP and cooperated with the authorities in the criminal investigation. This represents the first case in which a company has self-reported a violation under the CFPOA.

As part of its plea agreement, Griffiths Energy agreed to pay a fine and victim surcharge totaling $10.35 million. This was the largest fine ever paid for a CFPOA violation.

The Agreed Statement of Facts in the Griffiths Energy case stated that the sentence took into consideration:

[1] 15 U.S.C. §§78dd-1, et seq.
[2] S.C. 1998, c.34.

INTERNATIONAL BUSINESS BULLETIN

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a) The fact that the company fully cooperated with the authorities by self-reporting and disclosing the results of its internal investigation; and

b) The fact that the company had already implemented a robust anti-corruption compliance program.

This strongly implies that the penalty would have been higher had the company not self-reported, cooperated, and implemented an effective anti-corruption program. However, the fact that the fine imposed was still the largest penalty ever paid in Canada appears to contradict this implication.

Conclusion

Notwithstanding the above, the self-reporting of CFPOA violations, cooperation with the authorities, and the implementation of an effective anti-corruption compliance program should still benefit Canadian companies for a number of reasons:

a) An effective anti-corruption compliance program will significantly reduce the possibility of a CFPOA violation actually occurring.

b) In Canada, criminal liability may be attributed to a corporation only when an offence is committed by a "directing mind" of that corporation.[3] The implementation of an effective anti-corruption compliance program should help to establish that the directing minds of the company did not sanction the violation.

c) The Griffiths Energy case at least demonstrates that self-reporting, cooperation, and the implementation of an anti-corruption program are factors that will be considered when the penalty is assessed. This means that the possibility of a reduced penalty still exists.

d) If a Canadian company is also subject to the jurisdiction of the FCPA, it will clearly wish to self-report a violation to the Department of Justice and (if applicable) the Securities Exchange Commission and cooperate with those entities in their investigation. In such cases, self-reporting and cooperating with Canadian authorities should not expose the company to additional risks and may potentially reduce CFPOA-related penalties as well. ■

[3] *Canadian Dredge and Dock Co. v. The Queen* [1985] 1 S.C.R. 662.

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