

Companies' \$579 Million Settlement Underscores Government's Vigorous Enforcement of FCPA

On February 11, 2009, Kellogg Brown & Root LLC (KBR), formerly a subsidiary of Halliburton Company, pleaded guilty to charges related to the Foreign Corrupt Practices Act (FCPA). Together with Halliburton, KBR also entered into a simultaneous settlement with the Securities and Exchange Commission (SEC). Halliburton and KBR will jointly pay \$177 million in disgorgement of profits to the SEC, and KBR will pay a \$402 million criminal fine to the Department of Justice (DOJ). The half-billion-dollar total is the largest ever under the FCPA by a U.S. company. KBR is also required to retain an independent third-party monitor to evaluate and observe internal controls, record-keeping, financial reporting, and compliance policies over a period of three years, and to report to DOJ. Halliburton must retain an independent consultant to review its internal controls and record-keeping policies twice over a period of about one year.

The U.S. government's FCPA investigation started in 2003 based upon the 1990s acts of KBR, then owned by Halliburton. In the plea agreement, KBR admits that executives participated in a scheme to funnel about \$182 million through consulting companies, which were to use the funds in part to bribe unnamed top-level Nigerian government executive branch officials. The government officials controlled contracts worth \$6 billion for building liquefied natural gas plants on Bonny Island in Nigeria.

According to the plea agreement, the bribes were paid between 1994 and 2002. The conspirators used "cultural meetings" to plan some of them. KBR also admitted to intentional efforts to insulate itself from FCPA liability, including a decision to refrain from placing American citizens on the board of managers of a Portuguese special purpose corporation that facilitated the scheme.

The criminal fine imposed upon KBR could have been as high as \$753.6 million, according to a sentencing document filed jointly with the government, which stated that "tolerance of the offense by substantial authority personnel was pervasive throughout the organization" but that the organization "fully cooperated" with the investigation and "clearly demonstrated affirmative acceptance of responsibility for criminal conduct."

An SEC press release regarding the Commission's settlement with Halliburton and KBR credited "close and cooperative working relationships" between the SEC, DOJ, and "foreign law enforcement agencies and securities regulators" in FCPA investigations. The SEC civil complaint against the two companies alleged violations of the FCPA anti-bribery provisions and the records and controls provisions of the Securities Exchange Act of 1934 and its regulations.

Halliburton's press release revealed that Halliburton concluded a non-prosecution agreement with DOJ for the Nigeria FCPA matter, under which Halliburton will not face FCPA or bid-rigging charges but must cooperate with an ongoing investigation. The press release also stated that Halliburton will pay \$382 million of KBR's \$402 million criminal fine, pursuant to an indemnity provision in the KBR separation agreement.

In December 2008, Siemens AG pleaded guilty to violations of the FCPA internal controls provisions and books and records provisions. That plea imposed the heaviest-ever FCPA penalty against a foreign company – a total cost to Siemens of \$800 million, not including penalties levied by German prosecutors.

Together, the Halliburton and Siemens examples sharply underscore that businesses engaging in international transactions cannot risk engaging in activities that may violate the FCPA. Companies must develop robust FCPA compliance policies and diligently monitor whether those policies are being met.

If you would like to learn more about the recent settlement or discuss FCPA compliance policies, please contact your usual Ropes & Gray attorney.

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