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February 29, 2012

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DOJ and SEC Continue to Aggressively Enforce FCPA Despite Recent Setbacks

By **Robert L. Soza, Jr.**, **Elena P. Villaseñor**, and **Orlando Segura**

Despite what many would consider a severe blow to their efforts earlier this month, the U.S. Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC") have demonstrated that they are unrelenting in their pursuit to aggressively enforce the Foreign Corrupt Practices Act ("FCPA"). As a result, companies and their employees should be wary of doing business without a FCPA compliance and training program in place.

The FCPA makes it unlawful for U.S. companies and their subsidiaries, U.S. individuals, foreign securities issuers, and foreign companies and individuals, who act within the U.S., to make payments to foreign government officials to obtain or retain business. Since the FCPA was enacted in 1977, the SEC and DOJ focused FCPA efforts on collecting civil and criminal fines, typically in excess of $100 million, against corporate defendants for bribes made to foreign officials. In the last couple of years, however, the DOJ began to criminally prosecute the officers and employees of the companies that had been involved in the alleged bribes. Facing potential imprisonment, a number of defendants took their cases to trial against the DOJ.

The DOJ, however, has received three setbacks in the last few months. On December 1, 2011, in its first FCPA criminal prosecution to proceed to a jury trial—the "Lindsay Manufacturing Case"—the U.S. District Court for the Central District of California vacated the FCPA criminal convictions of the U.S. citizen defendants and dismissed criminal indictments against two Mexican nationals, citing pre- and post-indictment government misconduct. Then, on January 16, 2012, the U.S. District Court for the Southern District of Texas dismissed all charges against John O'Shea (accused of funneling bribes to Mexican officials to obtain contracts for his engineering firm), stating that the testimony of the government's chief witness was irreparably flawed. Just two weeks later, on January 31, 2012, a jury in the U.S. District Court for the District of Columbia acquitted two defendants in the much publicized "SHOT Show Case," in which FBI agents, in the largest FCPA undercover case in history, posed as Gabon Ministry of Defense officials hoping to receive bribes. A few days later, the court declared a mistrial for another two defendants and the DOJ dismissed the indictments of 16 other defendants.

Despite these setbacks, the DOJ is continuing to file new FCPA actions and take existing cases to trial. In late December 2011, the DOJ filed a criminal FCPA action in New York against eight former Siemens executives, who are foreign nationals, for conducting meetings in the U.S. to negotiate the terms of bribe payments and making use of U.S. bank accounts to pay the bribes to Argentine officials in exchange for a contract. The DOJ brought this criminal action despite the fact that Siemens AG settled these same claims with the SEC for $800 million in 2008. The DOJ also has two more

criminal FCPA cases set for trial this year, including the prosecution of two defendants in Haiti Telco case in Florida and the prosecution of five former executives of Control Components, Inc. in California.

While the SEC and DOJ continue to aggressively enforce the FCPA, companies and their employees live in an environment of uncertainty because there is little guidance available on how to interpret the FCPA. Now that FCPA defendants are taking cases to trial and challenging district court decisions on appeal, we hope to see some significant developments in this area. For instance, the Court in the Lindsay Manufacturing Case implied that the FCPA requires more than a showing of "willful blindness," a standard which the DOJ and SEC have been using for years in their FCPA complaints, and in a pending appeal, the Eleventh Circuit of the U.S. Court of Appeals will interpret the meaning of "foreign official" under the FCPA.

In the meantime, companies must develop and implement compliance and training programs, engage in in-depth due diligence efforts, and analyze mergers and acquisitions of foreign companies for potential successor liability in order to avoid potential SEC and DOJ prosecutions. Jackson Walker attorneys have international experience in FCPA compliance matters, and have developed compliance programs and conducted training for companies in U.S., Europe, Canada, and Mexico.

If you have any questions regarding this e-Alert, please contact **Robert L. Soza, Jr.** at 210.978.7718 or **rsoza@jw.com**.

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