
AMERICAN DEPOSITARY RECEIPTS AND THE FOREIGN CORRUPT PRACTICES ACT

Another international company has been caught in the net of the Foreign Corrupt Practices Act (“FCPA”).

Technip S.A. (“Technip”), a Paris-based engineering company, pleaded guilty under a deferred prosecution agreement with the U.S. Department of Justice, and agreed to pay a \$240 million criminal penalty. Under the plea agreement, Technip also agreed to retain an independent monitor to audit and implement Technip’s anti-bribery program. A related civil action, brought by the Securities and Exchange Commission, resulted in a settlement whereby Technip will pay \$98 million in fines for violating the FCPA’s books and records requirements.

Technip’s violations came to light in a far-reaching investigation into allegations that several companies engaged in a bribery scheme in connection with contracts awarded for the Bonny Island LNG plant in Nigeria. This investigation also snared KBR and certain of its principals.

KBR is a U.S. company that is clearly subject to the FCPA. But how did Technip, a French company that didn’t seem to conduct any of the alleged violations from inside the U.S., become subject to the FCPA? The answer is that the American Depositary Receipts, or ADRs, of Technip are traded on a U.S. stock exchange, making it an “issuer” whose activities are subject to enforcement by the Department of Justice, for violations of the anti-bribery provisions of the FCPA, and the Securities and Exchange Commission, for violations of its books and records provisions.

Technip is not the only company to find itself subject to the FCPA because of its ADRs. Statoil ASA, Renault Trucks ASA, and Volvo Construction Equipment AB were similarly caught because their ADRs were traded on U.S. stock exchanges.

Some companies mistakenly believe that if they engage in prohibited activity with no apparent contact with the U.S., they are not subject to FCPA enforcement action by the Department of Justice or the Securities and Exchange Commission. However, if a company is an “issuer” as defined in the FCPA, that company is, indeed, subject to FCPA enforcement, even if the conduct occurs completely outside the U.S. What the cases involving Technip, Statoil, Renault Trucks, and Volvo Construction Equipment illustrate is that the definition of “issuer” may catch some companies off-guard. Just the trading of a company’s ADRs on a U.S. stock exchange is sufficient to cause a company to be defined as an “issuer” under the FCPA, making it fully subject to FCPA enforcement, regardless of where the alleged improper activity takes place.

WHY IT MATTERS

FCPA enforcement by the Department of Justice and the Securities and Exchange Commission is at an all-time high. Further, while the U.S. leads the way in anti-corruption enforcement, international interest and cooperation has sky-rocketed in recent months, making companies vulnerable to cross-jurisdictional

anti-bribery investigations. All U.S. companies with even small amounts of business outside of the U.S., as well as foreign companies with U.S. subsidiaries or which list any class of securities on a U.S. stock exchange, are subject to FCPA enforcement. Fortunately, these companies can take steps to minimize their exposure to potential FCPA enforcement actions through an effective compliance program.

Implementing an effective compliance program is not necessarily a painful process. In fact, a compliance program that educates employees and standardizes third-party contracting processes and procedures can actually improve corporate efficiencies as well as increase the chances of a more favorable outcome in the event of an FCPA enforcement action.

For more information or if you have questions concerning this Client Alert, please contact the Thompson & Knight attorney with whom you regularly work or one of the attorneys listed below.

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