

GOVERNMENT BAILOUTS AND THE FCPA: ARE ANY FOREIGN COMPANIES NOW GOVERNMENT INSTRUMENTALITIES?

January 26, 2009

To Our Clients and Friends:

The worldwide financial crisis will have widespread and myriad effects on major corporations. In light of the increasing vigor with which the United States Department of Justice (“DOJ”) and the United States Securities and Exchange Commission (“SEC”) have been enforcing the Foreign Corrupt Practices Act (“FCPA”),¹ we believe that one potential effect that should not be overlooked at this time is the risk that non-U.S. corporations participating in government bailouts could become government instrumentalities under the FCPA.

GOVERNMENT INSTRUMENTALITIES

The FCPA prohibits promising, offering or giving anything of value to a government official, either directly or indirectly, in order to obtain or retain business or secure an improper business advantage. Whether the recipient of a gift or offer qualifies as a government official depends on whether the entity with which the recipient is affiliated is a government agency or instrumentality.

There is no case law defining what entities qualify as government instrumentalities for purposes of assessing who is a foreign official under the FCPA, but we believe that the essential question in such an analysis is whether the government has ownership or control over the entity. (An exception to this rule is that if local law considers an entity to be public or an employee to be a government official, then U.S. regulators will probably follow suit; the exception is not true in the inverse, however, as entities will often be considered public despite having private status in their home country.)

There are several ways in which a government’s infusion of capital into a company could give the government sufficient ownership or control over the entity that it qualifies as an instrumentality. First, a government could obtain a majority stake in the company. We view it as likely that the DOJ and SEC would consider any company majority owned by a government to be, ipso facto, a government instrumentality. Second, even if the government obtains only a minority stake it could gain the right to appoint a majority of the board,

¹ See *Fair Warning: Ignorance Is No Excuse When It Comes to the FCPA*, Debevoise & Plimpton LLP Client Update, March 31, 2008.

enough board members in critical positions to substantially influence its direction, or senior management. Third, the government could require the company to sell it a “golden share,” an equity position that allows the holder to exercise a veto over certain major decisions. The ability to veto only a narrow category of decisions, such as M&A transactions, may not by itself mean that a government controls a company, but if the golden share is broader and allows a government veto over, say, all major contracts as well, then the argument for control becomes stronger. Fourth, the government could use its equity stake, coupled with the threat of regulation or other government action, to dictate major corporate decisions to such an extent that it could be said to exert de facto control over the company.

Some recipients of bailout funds already meet one or some of these criteria. Royal Bank of Scotland (“RBS”), after encountering financial distress, was forced to sell a majority stake to the government of the United Kingdom. The DOJ and the SEC would thus likely consider tellers at RBS bank branches to now be government officials. Of course, it is highly unlikely that a company’s agent or employee would seek to bribe a bank teller to secure an improper business advantage, but the fact that companies must now grapple with the government-instrumentality analysis for a greatly expanded swath of companies and industries will impose regulatory costs.

WHAT YOU SHOULD BE DOING NOW

We recommend that all companies identify those counterparties with which they deal that have received large recent capital infusions from non-U.S. governments and, for each counterparty, assess whether the capital infusion and the resulting government control have been substantial enough to warrant treating the counterparty as a government instrumentality for purposes of the FCPA. Much of the information regarding the government’s involvement will likely be public, but it may also be necessary to inquire from the counterparty what control the government is exercising with its newfound power.

Please feel free to contact us with any questions.

Bruce E. Yannett

+1 212 909 6495

beyannett@debevoise.com

Paul R. Berger

+1 202 383 8090

prberger@debevoise.com

Steven S. Michaels

+1 212 909 7265

ssmichaels@debevoise.com

David C. Ware

+1 202 383 8152

dcware@debevoise.com