



Client Alert

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Exemplary cooperation, enhanced compliance program, and independent monitor protect company from criminal prosecution for FCPA violations

On May 14, 2008, the Department of Justice announced that Willbros Group, Inc. and its wholly owned subsidiary that conducts international operations, Willbros International Inc., (collectively "Willbros"), resolved a Foreign Corrupt Practices Act ("FCPA") investigation by agreeing to a deferred prosecution agreement and by agreeing to pay a \$22 million criminal penalty.¹ Willbros simultaneously resolved a parallel Securities and Exchange Commission ("SEC") investigation involving the company and several former employees by agreeing to a civil judgment permanently enjoining the company from future violations of securities laws and regulations and by agreeing to pay disgorgement of \$8.9 million, plus prejudgment interest of \$1.4 million.²

In the past few years, the number of FCPA investigations, prosecutions, and enforcement actions brought by the Department of Justice or the SEC has significantly increased. This alert describes the resolution reached by Willbros short of criminal prosecution and highlights the importance of an effective compliance program that seeks to protect a company from potential FCPA violations in the first instance.

The Foreign Corrupt Practices Act of 1977

The FCPA prohibits bribes or other improper or corrupt payments to foreign officials for the purposes of obtaining or retaining business. The FCPA was passed as a result of government investigations in the 1970s that resulted in over 300 American companies admitting to making questionable or illegal payments to foreign officials. The FCPA was amended in 1998 to apply to foreign firms and persons who undertake an act in furtherance of a corrupt payment while in the United States. Additionally, the FCPA requires companies whose securities are listed on United States stock exchanges to meet certain accounting provisions requiring accurate recording of transactions and the maintenance of adequate internal controls.

The FCPA applies to any individual, firm, officer, director, employee, or agent of the firm and any stockholder acting on behalf of a firm. The scope of the FCPA includes individuals or firms who assist or order another person or entity to violate the anti-bribery provisions. It also includes instances where a corrupt or improper payment is made, not to the government official, but instead to a third party, while knowing that all or a portion of the payment will go directly or indirectly to the foreign official. Such third

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party intermediaries could include agents or joint venture partners. The FCPA also applies to any corrupt or improper payments made or authorized by employees or agents of American companies operating entirely outside the United States, using money from foreign bank accounts, and without any involvement from personnel within the United States. In this manner, American parent corporations can be liable for the acts of their foreign subsidiaries. The FCPA can also apply to foreign companies if they cause an act in furtherance of a corrupt or improper payment to take place in the United States. For example, a foreign company that uses funds in a U.S. bank account to make a corrupt or improper payment may face exposure under the FCPA. Finally, a corrupt or improper payment made to induce or facilitate the award of foreign business need not succeed in order for the government to establish a violation of the FCPA. If an offer or promise to provide a corrupt or improper payment is made with the intent to induce the recipient to misuse his official position to direct business wrongfully to the payor or someone else for the benefit of the payor, a violation of the FCPA may be found.

Not all payments to foreign officials violate the FCPA. The FCPA specifically carves out from liability payments to facilitate or expedite performance of routine governmental action. Examples of routine governmental action include obtaining permits and licensing; processing governmental papers such as visa and work orders; providing phone, power and water supply; scheduling inspections; and loading and unloading cargo. A person or entity charged with an FCPA violation also may assert as a defense that the alleged corrupt or improper payment was lawful under the written laws of the foreign official's country or that the payment was a reasonable and bona fide expenditure, such as travel and lodging expenses, was made without a corrupt purpose, and was directly related to the promotion or explanation of products or services or the executing of a contract with a foreign government.

The penalties for violating FCPA's anti-bribery provisions can be severe. Companies are subject to fines that can be as high as twice the benefit they sought to obtain by making the corrupt or improper payment. Individuals are also subject to imprisonment of up to five years, and fines imposed on individuals cannot be paid by their employers. In addition to criminal prosecution, the SEC may proceed with a civil complaint against firms or individuals who violate the FCPA. In an SEC action, defendants may be fined and subject to injunctions to prevent any act or practice that may be related to the violation of the FCPA's anti-bribery provisions. Finally, in addition to fines, a corporation or person who violates the FCPA may be permanently barred from receiving contracts from the federal government and may be ruled ineligible to receive export licenses.

The Willbros Investigation and Deferred Prosecution Agreement

Willbros is a Panamanian company based in Houston, Texas and provides construction, engineering, and other services in the oil and gas industry. Willbros participated in a Nigerian natural gas pipeline system designed to relieve pipeline capacity restraints and also participated in a joint venture conducting repair work on existing offshore oil platforms in fields along the Nigerian coast. Willbros also conducted business in South America and obtained a \$3 million contract with a subsidiary of Ecuador's state-owned PetroEcuador gas company to rehabilitate 16 kilometers of a gas pipeline.

According to the Criminal Information alleging violations of the FCPA filed in the case,³ in 2003 and 2004, Willbros and its joint venture partners submitted bids for approximately \$387 million worth of contracts for the Nigerian natural gas pipeline system. They were awarded contracts worth approximately \$246 million. However, as alleged in the Criminal Information, Willbros, through the conduct of certain individuals and certain “sham ‘consultancy agreements’” and other arrangements with certain companies, agreed to make a series of corrupt payments in excess of \$6 million to a senior Nigerian governmental official and officials of Nigerian state-owned petroleum companies to obtain the work. Willbros is also alleged to have agreed to make a series of corrupt payments in excess of \$4 million in order to obtain the offshore oil platform repair work. Willbros ultimately did cause a number of these payments to be made. Finally, Willbros is alleged to have agreed to pay \$300,000 to Ecuadorian officials in order to obtain the \$3 million pipeline rehabilitation work in Ecuador.

Willbros agreed to a deferred prosecution agreement to resolve the criminal charges.⁴ Willbros, and certain employees, also agreed to a consent judgment in the SEC civil case, including disgorgement of \$8.9 million plus prejudgment interest of \$1.4 million against the company. Some individual employees also agreed to pay fines. Willbros and the individuals additionally agreed to an injunction prohibiting any future conduct similar to that which led to the investigation.

In entering the deferred prosecution agreement, Willbros acknowledged the truthfulness and accuracy of the pertinent facts of the Criminal Information. The government agreed that, provided Willbros complied with all of the terms of the deferred prosecution agreement, it would not proceed with the criminal prosecution and would dismiss the criminal charges against Willbros at the conclusion of the approximately three year term of the agreement. The material terms of the deferred prosecution agreement are as follows:

1. Willbros admits and acknowledges the facts of the Criminal Information setting forth violations of the FCPA.
2. The term of the agreement is three years and seven days, but it can be extended for an additional year if the government, in its sole discretion, determines that Willbros violated any provision of the agreement.
3. Willbros represents that it undertook numerous activities designed to identify violations of FCPA and prevent any future violations, including:
 - A. conducting a thorough internal investigation without delay;
 - B. severing employment relationship with a senior executive within 10 days of receiving allegations of improper activity;
 - C. taking prompt and appropriate disciplinary actions against 18 employees;
 - D. cooperating with the Department of Justice and SEC in their parallel investigations;
 - E. terminating commercial relationships with companies suspected of assisting in making improper payments to foreign government officials;
 - F. voluntarily agreeing to a limited waiver of the attorney-client privilege with respect to certain subject matters;
 - G. enhancing the company’s legal, accounting, and internal audit functions;

- H. issuing an enhanced, stand-alone FCPA policy and conducting company-wide training;
 - I. retaining new senior management with knowledge of FCPA requirements; and
 - J. acknowledging responsibility for misconduct.
4. Willbros agrees to cooperate fully with the government during the course of the agreement including truthfully disclosing all information related to corrupt payments, related false books and records, and inadequate internal controls. The government reserves the right to request attorney-client privileged information or information covered by the attorney-work product doctrine. While Willbros reserves the right to withhold such information, if such information is withheld, the government may consider this fact in determining whether Willbros is fully cooperating with the government as required.
 5. Willbros will pay a criminal penalty of \$22 million.
 6. Willbros has implemented a compliance and ethics program designed to detect and prevent violations of the FCPA and other anti-corruption laws.
 7. Willbros will engage an independent corporate monitor to assess and monitor Willbros' compliance with the deferred prosecution agreement.
 8. Willbros will not, through present or future attorneys, agents, directors, officers, employees or any other person, make any public statement contradicting the acceptance of responsibility as set forth in the agreed upon Statement of Facts.

Conclusion

According to the Department of Justice, Willbros avoided a criminal prosecution in large part because of its extensive internal investigation, "exemplary cooperation," implementation of an enhanced compliance program directed specifically at FCPA requirements, and the engagement of an independent monitor. Additionally, the company agreed to a large monetary penalty, both as a criminal sanction and to resolve the SEC investigation. Essentially, the company has entered into a three year probationary period at the end of which, if the company is still cooperating and complying, the criminal charges will be dismissed. While the terms of this agreement are rather onerous, they are likely less severe and damaging to the company than defending itself against a criminal indictment and perhaps losing at trial. Even if a company is ultimately successful in defending against criminal charges, the costs incurred – including the likely loss of business while under indictment and the related negative press – may nullify any victory.

American companies conducting business overseas, either directly or through subsidiaries or other intermediaries, along with foreign companies if any of their business touches the United States, must familiarize themselves with the prohibitions of the FCPA and should maintain and update a robust compliance program that specifically addresses FCPA issues. An effective compliance program is the first layer of defense in preventing potential FCPA exposure. Moreover, if a company does face an FCPA investigation, the existence of a meaningful compliance program is one of the factors that the Department of the Justice and the SEC specifically consider in determining whether to initiate a criminal prosecution or enforcement action.



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More Information

For more information on this case, the FCPA, or steps your company can take to protect itself, please contact Aaron M. Danzig (aaron.danzig@agg.com) or Kevin B. Getzendanner (kevin.getzendanner@agg.com).

Firm Overview

Arnall Golden Gregory LLP is an Atlanta law firm that serves the business needs of growing public and private companies. Through mergers and acquisitions, capital markets financing, strategic alliances, joint ventures, litigation and other business-related guidance, the firm helps clients across a broad range of industries turn legal challenges into business opportunities.

Government Investigations and Special Matters Practice Team

The AGG Government Investigations and Special Matters Team includes former federal prosecutors and former state and federal regulators. We represent companies, boards of directors, and individuals (including officers and directors) facing government and regulatory inquiries, investigations, and prosecutions.

Our attorneys are experienced in working with company management to respond to and manage organizational crises that may threaten the continued existence of the corporation. We have successfully represented companies and individuals, including executives of public companies, in civil and criminal investigations before the U.S. Department of Justice and U.S. Attorney's Offices, the SEC, FDA, EPA, USDA, and many other federal and state regulatory and enforcement agencies.

¹ Willbros Group Inc. Enters Deferred Prosecution Agreement and Agrees to Pay \$22 Million Penalty for FCPA Violations (May 14, 2008 Department of Justice Press Release).

² SEC Files Settled FCPA Action Against Willbros Group, Inc. and Several Former Employees, SEC Litigation Release No. 20571 (May 14, 2008), citing *Securities and Exchange Commission v. Willbros Group, Inc., et al.*, Civil Action No. 4:08-CV-01494 (S.D.Tex.).

³ *United States v. Willbros Group, Inc. and Willbros International, Inc.*, 08-CR-287 (S.D.Tex. May 14, 2008).

⁴ A Willbros employee was indicted for conspiring to violate the FCPA with respect to the Nigerian business. He pleaded guilty to this charge on November 5, 2007. *United States v. Steph*, H-07-307 (S.D.Tex. 2007).