COVINGTON

COVINGTON & BURLING LLP

E-ALERT | White Collar

February 22, 2011

UK BRIBERY AND CORRUPTION ENFORCEMENT UPDATE: CIVIL ORDERS

The UK Serious Fraud Office ("SFO") recently has announced two highly significant anti-corruption enforcement actions. These are vastly different enforcement actions but both are equally important in the evolution of the UK's anti-corruption enforcement landscape. The first builds on the SFO's goal of pursuing a civil rather than a criminal remedy against cooperating companies and the second is a reaffirmation of the SFO's focus on prosecuting senior officers of companies who are shown to have been involved in bribery or corruption. We examine and comment in this e-alert on the civil order that the SFO secured against M.W. Kellogg Limited (MWKL). The action taken against individuals in the second case will be examined in a second e-alert.

CIVIL RECOVERY

On 16 February 2011, the SFO announced that it had secured via an action in the High Court a civil order requiring MWKL to pay £7,028,077. The amount of the civil order – which was agreed between the SFO and MWKL – was stated to be a reflection of the sums that MWKL is due to receive that "were generated through the criminal activity of third parties" plus interest. MWKL is required to pay the foregoing amount within 14 days of the civil order.

The civil order relating to MWKL was made under Part 5 of the UK's Proceeds of Crime Act 2002 ("POCA"), a statute that allows prosecutors to target and recover – by agreement with the company in the appropriate case – identifiable property that has been acquired through criminal conduct. POCA does not require proof of any underlying criminal offence by the company subject to the order. Rather, the civil order targets the funds in the subject company's possession.

BACKGROUND

In September 1998, Halliburton (a US company) acquired Dresser Industries ("Dresser"), including Dresser's subsidiary M.W. Kellogg Company ("Kellogg"). Halliburton combined Kellogg with its own subsidiary Brown & Root to form Kellogg, Brown & Root, which is now a wholly-owned subsidiary of KBR Inc. MWKL is a London based engineering, procurement and construction contractor and a wholly owned subsidiary of KBR.

In February 2009, the US Department of Justice ("DoJ") and Securities and Exchange Commission ("SEC") took action against Halliburton, KBR and Kellogg Brown & Root for improper payments to Nigerian officials in connection with the Bonny Island liquefied natural gas project. The fines and penalties that the DoJ and SEC imposed amounted to $579 million.

The stated facts are that between 1995 and 2004, senior executives at KBR and others devised and implemented a scheme to bribe Nigerian government officials to obtain contracts worth over $6 billion to build liquefied natural gas ("LNG") production facilities on Bonny Island, Nigeria. The winning bidder for the work was a four party joint venture between KBR, Snamprogetti, Technip and Japan Gas Corporation (TSKJ). KBR, through the joint venture, entered into fictitious "consulting" or "services" agreements with intermediaries that then funneled their fees to Nigerian officials. The scheme used, amongst others, a Gibraltar shell company controlled by a UK based solicitor and a Japanese trading company as conduits for the bribes.

The SFO took the view that MWKL was used by KBR and was not a willing participant in the corruption. In its press release the SFO set out its view of the facts as follows:

> "KBR was one of four corporate entities which formed a joint venture to bid for contracts on a liquefied natural gas project in Nigeria. The joint venture created three special purpose vehicles to bid for, and subsequently run, the contracts. Three of the four contracts won by the joint venture were obtained through promises to pay or payments of bribes. The US parent company, Kellogg Brown and Root LLC and its predecessors (KBR) has been subject to a criminal and civil investigation in the US. The criminal investigation, which was conducted by the Department of Justice (DOJ), into the Bonny Island Project related to KBR and a number of other corporate and individual parties being involved in bribery and corruption. KBR has acknowledged, in its plea agreement with the DoJ, that it owned the special purpose vehicle created for the Nigerian project, through MWKL in order to distance itself from the corruption and avoid the consequences of the Foreign Corrupt Practices Act 1977. KBR had resolved all matters with the US authorities, including a civil settlement with the Securities and Exchange Commission, by February 2009."

In announcing its agreed civil order against MWKL, the Director of the SFO, Richard Alderman, stated again that the SFO will seek to dispose of appropriate cases by way of civil sanctions rather than a criminal prosecution. Director Alderman noted in that connection that –

> "[t]he SFO will continue to encourage companies to engage with us over issues of bribery and corruption in the expectation of being treated fairly. In cases such as this a prosecution is not appropriate. Our goal is to prevent bribery and corruption or remove any of the benefits generated by such activities. This case demonstrates the range of tools we are prepared to use."

William P. Utt, KBR's President, Chairman and CEO, used his announcement to draw a line under the matter, noting that –

> "[t]his settlement [is] expected and closes out an unfortunate part of KBR's past. We have since moved forward, conducting our business with transparency, accountability and discipline in our continued efforts of being the global contractor of choice."

Under KBR's indemnity agreement with Halliburton, 55% of the settlement costs will be reimbursed to KBR.

THE FACTORS TAKEN INTO ACCOUNT BY THE SFO

It is instructive to look at the factors that the SFO cited in explaining its decision to pursue a civil rather than a criminal remedy against MWKL:

- MWKL took no part in the criminal activity that generated the funds at issue.
- MWKL was used by its parent company and was not itself a willing participant in the corruption.
- The contracts at issue were awarded to a company partly owned by MWKL on behalf of its US parent company.
- The funds due to MWKL were share dividends payable from profits and revenues generated by contracts obtained by bribery and corruption undertaken by MWKL's parent company and others.
- MWKL reported its concerns to the SFO under the "self referral" scheme that the SFO has established and fully co-operated with the subsequent investigation.

- MWKL overhauled its internal audit and control measures to enable it to satisfy the SFO that its compliance systems are in accordance with UK law.
- MWKL agreed to pay the costs of the investigation.

It is also clear from the SFO statement that it was mindful of the fact that criminal and civil action had been taken in the US based on the facts that formed the basis of the allegation against MWKL. The parent company, KBR – having entered into a Deferred Prosecution Agreement ("DPA") with the DoJ – would leave scope for arguments of double jeopardy under English law in the event of a criminal charge being laid against MWKL based on facts that formed the basis of the DPA.

CONCLUDING COMMENTS

This is the third agreed civil order that the SFO has secured since 2008 and is the first following the much reported case of *R v Innospec*. After the *Innospec* decision, many commentators had taken the comments of LJ Thomas to mean that the SFO was not entitled to enter into any further agreed civil orders with companies. That was clearly a misreading of the SFO's powers. The SFO retains the power to enter into agreed civil orders under part 5 of POCA in appropriate cases. The resolution of the MWKL case provides confirmation of that fact.

The SFO is likely to make increasing use of the agreed civil order mechanism until such time as it or its successor enforcement organisation is given the power to impose fines on companies or enter into agreements such as a DPA, a mechanism that has been used effectively by the DoJ in recent years.

In the event that a company uncovers issues or concerns about any part of its operations around the world, the company should immediately seek appropriate advice on the best approach to investigating the issue, remedying any control deficiencies that are discovered and, if necessary, deciding how to engage with the appropriate enforcement agencies. If an approach is to be made to the SFO it is important that those advising have detailed knowledge of the factors that the SFO would take into account when considering an alternative to a criminal prosecution such as an agreed civil order.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our firm:

Robert Amaee	+44.(0)20.7067.2139	ramaee@cov.com
John Rupp	+44.(0)20.7067.2009	jrupp@cov.com