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News Corp.'s FCPA Problem

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In the wake of the phone-hacking scandal that brought down the U.K.'s "News of the World," the U.S. legal community now contemplates the implications for the newspaper company's U.S. parent, News Corp. The FBI and DOJ are reported to be investigating allegations that some phone hacking took place in the United States—including of phones belonging to the 9/11 victims. In addition, speculation is rampant that the DOJ, as well as the SEC, will not limit their investigation to conduct that occurred within the United States, but will invoke their most far-reaching extraterritorial tool—the Foreign Corrupt Practices Act—to impose liability on News Corp. for the acts of its foreign subsidiary, News International. The FCPA "hook" is that employees at News International are reported to have bribed British police officers in exchange for information that the company then used to develop news stories.

Anti-Bribery Provisions. The FCPA's anti-bribery provisions criminalize the corrupt payment of "anything of value" to a "foreign official" for the purpose of "obtaining or retaining business." While the focus of FCPA enforcement actions traditionally has been on bribes paid to obtain business from the government, the DOJ and SEC have drawn no distinction between such cases and cases in which companies have paid bribes for purposes of obtaining other forms of business advantage. Nevertheless, U.S. authorities may face an insurmountable hurdle enforcing the anti-bribery provisions unless they can show that News Corp. engaged in bribery or, at a minimum, authorized or assisted its foreign subsidiary to do so.

Books and Records and Internal Control Provisions. The likelihood of an FCPA enforcement action is greater under the statute's Books and Records and Internal Control provisions. The DOJ and SEC have used those provisions with increasing regularity to hold U.S. issuers responsible for inaccuracies in the books of their foreign subsidiaries on the theory that those books are consolidated with those of the parent companies for financial reporting purposes. To establish that these provisions were violated, U.S. authorities will look to show that News International failed to account accurately for any improper payments, or that News Corp. failed to enact internal controls to prevent and detect them.

Diplomatic Considerations. It remains to be seen how far U.S. regulators will take any FCPA investigation. The U.K. has shown a renewed commitment to combating bribery with its passage of the Bribery Act. While the Act itself would not apply retroactively here, that commitment as well as the notoriety of this case may lead the U.K. to investigate and prosecute any wrongdoing to the fullest

extent of its pre-Bribery Act laws. Of course, U.S. authorities may nonetheless determine that, whatever steps are taken by the U.K. against News International, they have an independent interest in enforcing their own laws against U.S.-based News Corp.

Follow-On Civil Litigation. Whether U.S. authorities ultimately bring an FCPA action against News Corp., the company and board will still have to deal with related civil litigation. Despite there being no private cause of action under the FCPA, shareholders are increasingly bringing derivative suits and securities fraud class actions to address allegations of bribery. News Corp. has proven to be no exception, as shareholders who have seen the value of their investment drop have already filed a putative securities fraud class action in the Southern District of New York. And just one day after the News of the World announced it would publish its last edition, another group of shareholders—who had previously filed a derivative suit against News Corp.’s board in Delaware Chancery Court—filed an amended complaint alleging that the board failed in its governance role to detect the crimes committed by its subsidiary. These, and other lawsuits that have since been filed, highlight the risk of litigation that companies headquartered in the United States face—in addition to the prospects of government enforcement—when wrongdoing is detected in their subsidiaries around the world.

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