

**SEC DROPS APPEAL IN FCPA ENFORCEMENT ACTION**

On September 1, 2004, the U.S. Securities and Exchange Commission issued a litigation release announcing it had dropped its appeal in *SEC v. Mattson*, Civil Action No. H-01-3106 (S.D. Tex.) (filed Sept. 11, 2001). See SEC Action Against Baker Hughes Incorporated's Former Chief Financial Officer And Controller Is Concluded, Litigation Release No. 18863 (Sept. 1, 2004) (hereinafter "Litigation Release").

In this enforcement action under the Foreign Corrupt Practices Act ("FCPA"), the Commission had alleged that Baker Hughes Inc.'s former Chief Financial Officer and its Controller had authorized Baker Hughes' Indonesian accountant, KPMG - Siddharta, Siddharta & Harsono, to pay a \$75,000 bribe to an Indonesian tax official. The Commission alleged that the purpose of the payment was to influence the tax official in reducing a tax assessment levied against Baker Hughes' Indonesian affiliate, PT Eastman Christensen ("PTEC"). The Commission asserted that the payment violated the antibribery, books and records, and internal controls provisions of the FCPA.

On September 9, 2002, the U.S. District Court for the Southern District of Texas dismissed the SEC's antibribery claim on grounds that a bribe paid to a foreign tax official for purposes of obtaining a tax reduction does not constitute a payment made to "obtain or retain business" as required under the FCPA. See Mem. Op. and Order, *SEC v. Mattson*, Civil Action No. H-01-3106 (S.D. Tex., Sept. 9, 2002). Following the court's ruling, the Commission dropped its books and records and internal controls claims in order to pursue an appeal of the district court's dismissal of the antibribery claim in the Fifth Circuit Court of Appeals.

In its Litigation Release, the Commission announced its dismissal of the appeal. Had the appeal gone forward, the Fifth Circuit would have further elaborated on the scope of the "obtain or retain business" element of the FCPA in light of its recent opinion in *United States v. Kay*, 359 F.3d 738 (5<sup>th</sup> Cir. 2004). Both *Kay* and *Mattson* shared a common issue -- whether a payment to a foreign official to obtain favorable tax treatment constitutes a potential violation of the FCPA.

In *Kay*, the Fifth Circuit held, contrary to the district court's holding in *Mattson*, that a bribe paid to a foreign tax official to secure reduced customs or tax liabilities *may* constitute a payment made to "obtain or retain business" within the meaning of the FCPA. *Kay*, 359 F.3d at 755. The Fifth Circuit further explained, however, that to make out a claim under the FCPA relating to such a payment, the government must show a nexus between the tax benefit sought by the payor and the payor's ability to "obtain or retain business." In the absence of such a business nexus, the payment would not violate the FCPA. Had the *Mattson* appeal gone forward, the issue would have been whether the Commission adequately alleged a nexus between the alleged tax benefit sought and PTEC's ability to obtain or retain business. Mr. Mattson's case was handled by Martin J. Weinstein and Robert J. Meyer of Willkie Farr & Gallagher LLP's Compliance and Enforcement Practice Group.

Despite the Commission's implicit acknowledgement that there are limits to the reach of the FCPA in the context of a payment intended to reduce a tax liability, the "obtain or retain business" element of an FCPA violation is still a very broad one and the Commission will continue to investigate and bring enforcement actions relating to such payments. As such, companies should continue to review carefully any payment or anything of value given or provided to a foreign official, under any circumstances, for FCPA compliance.

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If you have any questions concerning the foregoing or would like additional information, please call Martin J. Weinstein (Chair, Compliance & Enforcement Practice Group) at (202) 303-1122 or Robert J. Meyer (Vice-Chair) at (202) 303-1123.

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