



## International Trade and Technology Transfer (IT<sup>3</sup>) **ALERT**

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### Companies May Face SEC Sanctions for Their Distributors' Actions

Companies must be aware that they may now face sanctions in the United States if their distributors pay bribes. A December 22, 2008 [Securities and Exchange Commission \(SEC\) release](#) notes the penalties imposed on Fiat S.p.A. and its subsidiaries for bribes paid in connection with the United Nations' Oil for Food program. We believe this may be only the second instance of a company being sanctioned for working with a distributor who was paying bribes (the *InVision* case seems to be the first). Based on general agency principles, some have thought a principal could clearly be Foreign Corrupt Practices Act (FCPA) liable for bribes paid by its sales agent. However, if foreign transactions were with a distributor, absent direct wrongdoing by the manufacturer/seller, a question remained as to whether a covered seller was insulated from bribery in the distributor's contracts.

The SEC claimed Fiat's subsidiary, IVECO S.p.A., used its office in Egypt to enter into four contracts with various Iraqi government ministries during the Oil for Food program for the sale of commercial vehicles and parts. IVECO's Egypt-based agent submitted invoices with inflated commissions, and despite the unusually large commissions, IVECO paid the invoices. IVECO paid about US\$1.8 million in kickbacks or after-sales services fees (ASSFs).

In 2000 IVECO changed its method for doing business, and the Egypt-based agent became its distributor in Iraq. The distributor in turn purchased equipment from IVECO and sold it to the UN, again using inflated contracts. With this approach IVECO hoped to distance itself from any involvement with possible kickbacks.

According to the SEC, Fiat did not maintain a system to detect and prevent ASSFs and, from its direct sales to Iraq, IVECO knew or should have known that the agent's sales included ASSFs. Without admitting or denying the SEC's allegations, Fiat disgorged US\$5.3 million in profits, almost US\$1.9 million in prejudgment interest and a civil

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penalty of US\$3.6 million. In addition, Fiat will pay a US\$7 million penalty pursuant to a deferred prosecution agreement with the US Department of Justice's Fraud Section.

The FCPA applies to all US individuals and corporations, non-US corporations with securities registered on US stock exchanges and any person or corporation acting in the United States. While the FCPA does not directly apply to non-US subsidiaries of US legal persons, a US entity can be liable for the acts of its foreign subsidiary, such as when it approves or authorizes those acts, and US and other firms with securities registered with US exchanges are required to exert adequate financial controls over their more than 50-percent controlled foreign subsidiaries and to ensure their books and records accurately report expenditures including any improper foreign payments. As companies expand or operate in parts of the world where bribery and corruption are common, the *Fiat* decision highlights the need to develop strong compliance programs to avoid sanctions similar to those described above.

Whether your company is active in Rio de Janeiro or Moscow, Shanghai or Caracas, Squire Sanders has the capability to assist in FCPA compliance plan preparation and implementation including addressing issues related to use of foreign distributors, subsidiaries, joint ventures and foreign agents.

For further information on the FCPA or *Fiat* decision, please contact one of the lawyers listed in this Alert or your primary Squire Sanders lawyer.

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