SULLIVAN & CROMWELL LLP

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Foreign Corrupt Practices Act – Recent Developments

DOJ and SEC Reach Settlements with Six Companies

SEC Employs Expansive Jurisdictional Theory to Charge Non-Issuer Defendant

Self-Reporting and Cooperation are Rewarded, But Do Not Guarantee Leniency

DOJ and SEC Appear to Retreat from Use of Corporate Monitors

SUMMARY

On November 4, 2010, the U.S. Department of Justice and the Securities and Exchange Commission announced resolutions with six companies for violations of the Foreign Corrupt Practices Act (FCPA), arising principally from the payment of bribes to Nigerian government officials. The companies agreed to pay aggregate criminal penalties of more than $150 million, as well as $80 million in civil penalties, disgorgement, and interest.

The settlements illustrate not only DOJ and SEC's aggressive and escalating enforcement of the FCPA, but also an expanded jurisdictional reach. The settlements include guilty pleas by two corporations and charges by the SEC against a non-U.S. issuer. In an apparent departure from DOJ's recent practices, however, none of the settlements required the appointment of a third-party monitor for any of the companies involved.

The resolutions demonstrate that while the DOJ and SEC continue to reward self-reporting of FCPA violations and cooperation in their investigations, these responses do not guarantee lenient treatment. One of the settling companies—Pride International, Inc.—entered into a deferred prosecution agreement, and its subsidiary agreed to plead guilty, even though Pride itself had discovered the bribery, voluntarily

and timely reported the misconduct, conducted a thorough internal investigation and compliance review, and engaged in voluntary remediation.

DISCUSSION

The November 4 settlements involved criminal and civil charges against six companies, along with various of their subsidiaries, for violating the FCPA's anti-bribery, record-keeping, and internal-controls provisions.[1] The charges arise principally from illicit payments made by affiliates of Panalpina World Transport (Holding) Ltd., a freight forwarder, on behalf of oil services companies in Nigeria. The bribes were paid to Nigerian government officials for the purpose of securing preferential customs treatment.

SETTLEMENTS RUN THE SPECTRUM OF SEVERITY

While the settlements each involved substantial fines and penalties, they run the full spectrum of severity seen in recent FCPA cases. Because the settlement papers describe the different ways in which the companies responded to the discovery of generally similar FCPA issues, they provide some useful guideposts for assessing how the DOJ and SEC may react to different corporate responses in FCPA cases.

- Noble Corp. received the most lenient sanction. It settled civil charges with the SEC through payment of $5.58 million in disgorgement and prejudgment interest, entered into a non-prosecution agreement with DOJ, and paid a $2.59 million criminal penalty. The agreement states that DOJ agreed to this resolution because Noble: (1) had a "pre-existing compliance program" that led its Audit Committee "to detect and prevent improper conduct from occurring"; (2) "discover[ed] . . . the [FCPA] violations through its own internal investigation"; (3) provided "timely, voluntary, and complete disclosure of the facts"; (4) engaged in "extensive, thorough, real-time cooperation" with DOJ and SEC; (5) performed a "voluntary investigation of [its] business operations throughout the world"; (6) undertook "remedial efforts to enhance its compliance program and oversight"; and (7) agreed to "continue to implement enhanced compliance measures" that are specified in the non-prosecution agreement.
- Tidewater Inc. avoided criminal prosecution, but on terms somewhat more severe than Noble. It settled the SEC's charges by disgorging $8.1 million and paying a $217,000 civil penalty. Its subsidiary entered into a deferred prosecution agreement with DOJ that involved payment of a $7.35 million penalty, representing an approximate thirty-percent reduction from the bottom of the fine range indicated by the U.S. Sentencing Guidelines. DOJ credited Tidewater with having "promptly commenced an internal investigation into . . . dealings with [Panalpina] after becoming aware of information indicating potential issues" and "voluntarily disclos[ing] the conduct."
- Royal Dutch Shell plc and Transocean Ltd. also avoided prosecution but came in for substantially more severe financial penalties. Shell paid $18.15 million in disgorgement and prejudgment interest to the SEC, and a $30 million fine to DOJ in connection with a deferred prosecution agreement. Transocean and its affiliates paid $13.13 million in disgorgement and civil penalties to the SEC and a $13.4 million criminal fine to DOJ, also in connection with a deferred prosecution agreement.
- By contrast, Pride International, Inc. was unsuccessful in avoiding criminal prosecution or substantial fines, even though it appears to have done everything that DOJ and the SEC have been urging companies to do in responding to FCPA issues. Pride discovered and self-reported its own

[1] *See* 15 U.S.C. § 78dd-1(a) (FCPA anti-bribery provision); *id.* § 78m(b)(2) (FCPA provisions relating to accurate books and records and adequate internal accounting controls). Some of the settlements included charges of conspiring to violate the FCPA, *see* 18 U.S.C. § 371, and aiding and abetting primary violations of these provisions, *see id.* § 2.

misconduct, conducted a thorough internal investigation that involved a comprehensive anti-bribery compliance review of its business operations in high-risk countries, and undertook voluntarily remedial measures. Nevertheless, Pride agreed to pay $23.53 million in disgorgement and prejudgment interest to the SEC and a $32.63 million criminal penalty. Its subsidiary agreed to plead guilty. While the substantial disgorgement suggests that Pride received greater benefits from its misconduct than the other involved companies, the severity of the resolution reflects that DOJ and the SEC continue to send mixed messages about the benefits to be achieved from self-reporting and cooperation.

- Panalpina—which was held responsible for $49 million in bribes based on conduct DOJ described as "pervasive and long-running"—was singled out by the authorities for harsh treatment based on its recalcitrant response upon learning of the potential FCPA issues. DOJ noted that after learning of the investigation from its customers, Panalpina "did not voluntarily disclose the conduct . . . and did not stop the illegal payment of bribes that was occurring on multiple continents." Thereafter, in response to a request from DOJ, Panalpina exhibited "reluctance to cooperate with the investigation." Ultimately, Panalpina did cooperate, but it paid a severe price for its initial recalcitrance. Not only did Panalpina enter into a deferred prosecution agreement, but its subsidiary agreed to plead guilty, and the companies agreed to disgorge $11.30 million and pay a criminal fine of $70.56 million.

SEC CHARGES NON-ISSUER DEFENDANT

The resolution with Panalpina is also significant because the SEC brought FCPA charges against an entity that is neither a U.S. issuer nor affiliated with one. Instead, the SEC proceeded against Panalpina "as agent of its issuer customers and acting on their behalf," and on grounds that Panalpina "aided and abetted" its customers, which were issuers, in violating the anti-bribery, record-keeping, and internal-controls provisions of the FCPA. While DOJ has previously proceeded against non-issuers for FCPA violations, the SEC's jurisdictional theory represents an aggressive foray.

NO THIRD-PARTY MONITORING

A noteworthy feature of the settlements is that none involved the imposition of third-party monitors. Monitorships have been a relatively regular feature of corporate deferred prosecution agreements—particularly in FCPA cases—but have come in for criticism from some quarters for the substantial expense and potential disruption to business. DOJ's decision not to insist upon third-party monitors for any of these companies may signal a new approach in this area.

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