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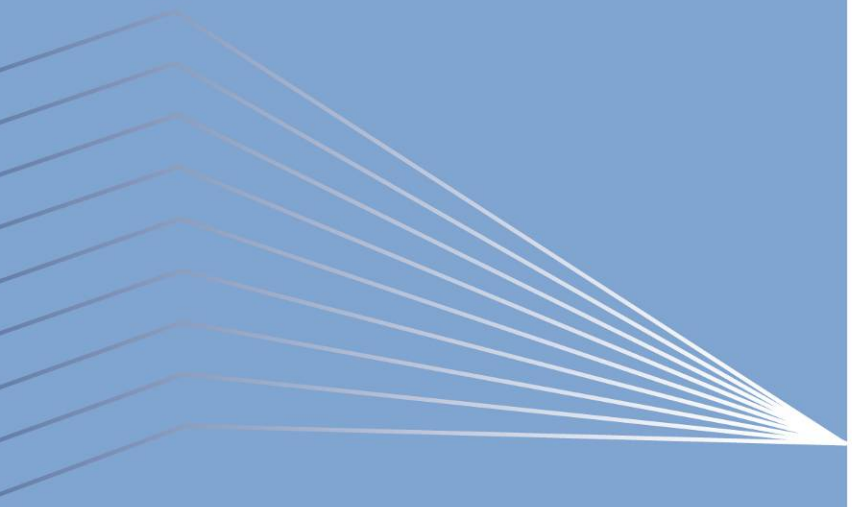


FCPA Digest

Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act

JULY 2012

Table of Contents

Recent Trends and Patterns in FCPA Enforcement

Recent Trends and Patterns in FCPA Enforcement

We're a little late this year with our mid-year *Trends & Patterns*, mostly because we were looking for more activity to flesh out the first half of the year. Indeed, two new enforcement actions were brought in July, *Orthofix* and *NORDAM*. Nevertheless, in terms of new prosecutions, it has been a fairly slow time, although the DOJ, in particular, has cleared away some previous cases with pleas, dismissals, and sentencings. That being said, the seven new corporate cases, five new individual cases, and various other proceedings that occurred in 2012 to date do raise some very interesting and instructive issues. Among the highlights:

- Continued fines and penalties averaging $18.5 million, with rare outliers of both low and high penalties reflecting specific facts and circumstances;
- Variations in the use, scope, and duration of monitors, with the preferred default now appearing to be self-monitoring and reporting;
- The beginnings of results from industry sweeps, with three medical device manufacturers settling enforcement actions;
- No concessions by the government on the scope of "instrumentalities," with the vast majority of cases involving state owned entities; and
- Increasing, albeit uneven, foreign enforcement by other OECD countries of their versions of the FCPA.

Enforcement Actions and Strategies

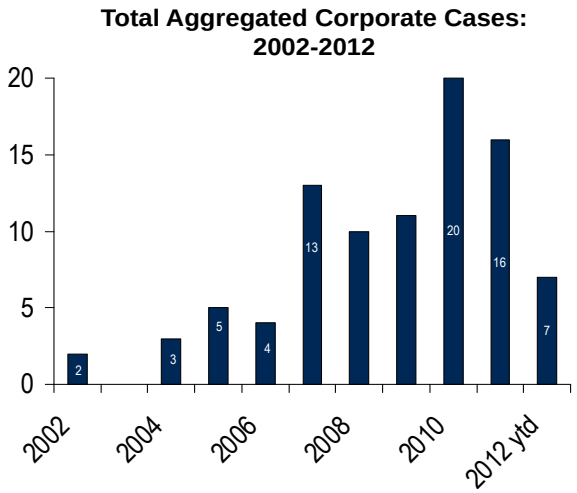
Statistics

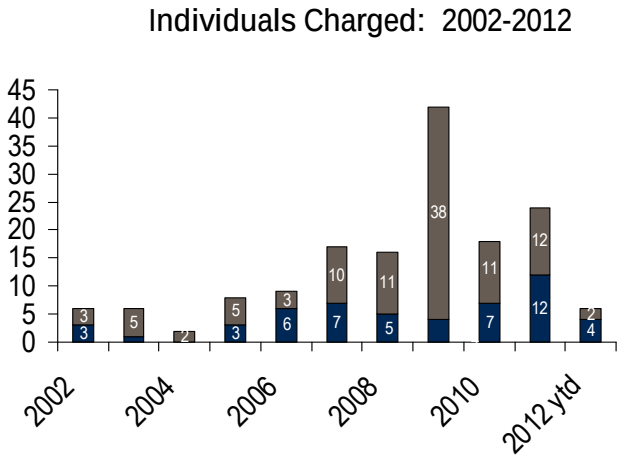
As always, before getting into a substantive discussion, we provide some statistical context for the new cases.

For clarity's sake, we count all actions against a corporate "family" as one action. Thus, if the DOJ charges a subsidiary and the SEC charges a parent issuer, that counts as one action. In addition, we count as a "case" both filed enforcement actions (pleas, deferred prosecution agreements (DPAs), and complaints) and other resolutions such as non-prosecution agreements (NPAs) that include enforcement-type aspects, such as financial penalties, tolling of the statute of limitations, and compliance requirements. Applying those criteria, in 2012 thus far, the government has brought seven enforcement actions against corporations: *Biomet*, *BizJet/Lufthansa Technik*, *Marubeni*, *Smith & Nephew*, *Data Systems & Solutions*, *Orthofix*, and *NORDAM*. In one very public exception, both the DOJ and the SEC declined to charge Morgan Stanley, stating that the violations committed by its employee, *Garth Peterson*, had occurred in spite of an extremely rigorous and apparently effective global anti-corruption program.

Recent Trends and Patterns in FCPA Enforcement

Especially considering that two cases, *Orthofix* and *NORDAM*, were filed in July, this pace of enforcement actions is slightly down from previous years, which have seen annual totals averaging fourteen cases per year since 2007. In some ways, it may reflect a continuation of a trend from last year, which saw the government bring nine corporate cases in the first half of the year but seven in the last half, and now seven in the first half of 2012. As we speculated in our previous *Trends & Patterns*, this reduced pace may reflect the DOJ's pre-occupation with preparing for trials and winding-up some of their less successful enforcement actions, such as *O'Shea*, *Lindsey*, and the *SHOT Show* cases, as discussed below. Nevertheless, we understand that there are some significant cases in the pipeline, and it is possible that the second half of the year may bring the numbers up. Further, it is interesting that three of the seven corporate cases thus far in 2012 arose out of the industry sweep targeting medical device companies that began in the Fall of 2007, when the DOJ and SEC sent letters to several medical device companies regarding an informal probe into possible FCPA violations.

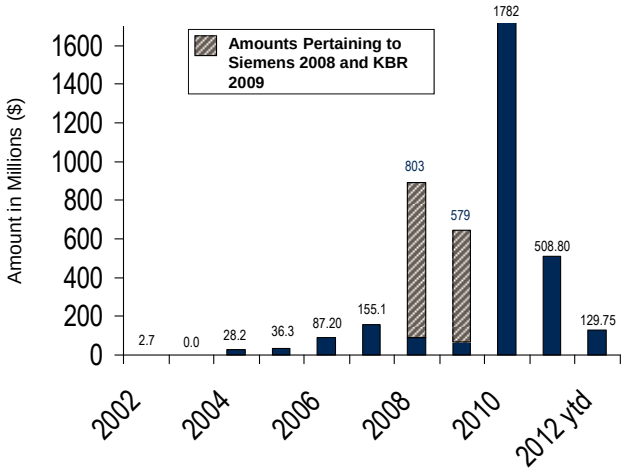




We see a similar pattern on the individual side, with five individuals having been charged in 2012. One of those individuals, *Cecilia Zurita*, was added to the existing *Haiti Telecom* case. Three more individuals, *James Ruehlen*, *Mark Jackson*, and *Thomas O'Rourke*, all of whom were charged by the SEC, are all current or former executives of *Noble Corporation*, which settled with the SEC and the DOJ in 2010. Thus, the only true new case is that brought by the DOJ and the SEC against the former Morgan Stanley employee, *Garth Peterson*. We note that several of the corporate cases identified, but did not charge, a number of executives by title and contain specific allegations concerning wrongdoing; it is possible that the government may proceed against some of these individuals in the future, even several years after the corporate settlement, as it did with the *Noble* executives this year and the *Siemens* executives last year.

Further, there remains a considerable pipeline of individuals awaiting trial (albeit some of them are fugitives or have not been served), including at least sixteen defendants in DOJ cases and eleven defendants in SEC cases.

Total Criminal and Civil Fines Imposed on Corporations: 2002-2012



On the penalties side, the corporate penalties assessed in 2012 are consistent with those imposed in previous years. Altogether, the government collected $129,748,231 in financial penalties (fines, DPA/NPA penalties, disgorgement, and pre-judgment interest) from corporations thus far in 2012. This equates to an average of $18.5 million per corporation with a range of $2 million (*NORDAM*) to $54.6 million (*Marubeni*). *Marubeni*'s penalty is over twice that of any of the other companies, and it was part of the *TSKJ* cases, which have yielded over $1 billion in total fines to date. *NORDAM* received a significant discount on the basis of potential insolvency. Therefore, a more accurate average, with those outliers removed, is $14.6 million. Both of these numbers, in fact, compare favorably with previous years. For example, using the same criteria, the averages in 2011 were considerably greater, at $33.8 million (total average) and $22.1 million (average with high and low outliers removed).

On the individuals side, one of the individuals, *Zurita*, is a fugitive and two others, *Ruehlen* and *Jackson*, are pending trial. The other *Noble Corp*. defendant, *O'Rourke*, is presumably cooperating and settled with the SEC for the relatively modest fine of $35,000. The one criminal defendant, *Garth Peterson*, has not yet been sentenced. Of particular note, however, is that in the parallel SEC case, Peterson agreed to turn over to a court-appointed receiver his shares in the investment vehicle he shared with the Chinese official—shares that are estimated to be worth $3.4 million. Interestingly, because of this provision, Judge Weinstein refused to accept the SEC settlement immediately, holding that provisions in the DOJ agreement that required Peterson to cooperate with the SEC's confiscation of this asset required him to address the criminal plea and civil settlement together.

In contrast to the relative dearth of enforcements in the first half of 2012, numerous individuals pleaded guilty, were convicted, or were sentenced for their guilty pleas and convictions in previous enforcement actions. *Jean Rene Duperval*, *Haiti Telecom*'s former head of international relations and the first ever foreign official to stand trial in connection with offenses related to a violation of the FCPA, was convicted on twenty-one money-laundering counts. The government was also able to resolve the *CCI* case almost in

its entirety, with four of the five remaining defendants pleading guilty this year: *Stuart Carson*; his wife *Hong Carson*; *Paul Cosgrove*; and *David Edmonds*. The case against the only remaining *CCI* defendant, *Han Yong Kim*, is not yet before the court. Meanwhile, ten individuals were sentenced: three from *Latin Node* (*Manuel Caceres*, *Juan Pablo Vasquez*, *Manuel Salvoch*), three from *KBR* (*Wojciech Chodan*, *Jeffrey Tesler*, *Albert Jackson Stanley*), three from *Haiti Telecom* (*Robert Antoine*, *Jean Rene Duperval*, *Patrick Joseph*), and one from *ABB* (*Fernando Maya Basurto*). Sentences ranged from one year probation for *Chodan* to nine years imprisonment for *Duperval*. *Duperval* is appealing his sentence. Meanwhile, *Antoine*, who was originally sentenced to four years, received a reduced sentence of eighteen months, after prosecutors filed a motion to reduce Antoine's prison term for his cooperation with law enforcement.

Modes and Elements of Settlements

As in the past, all of the corporate settlements were in the form of deferred or non-prosecution agreements, with no corporation pleading guilty to an offense. We do not necessarily think this is a bad thing, as these alternative dispositions provide concrete benefits, notably in the areas of certainty and compliance, to both parties. There are, however, a few interesting developments in the more recent enforcement actions.

First, only three of the seven corporations charged in 2012 had independent monitors imposed on them; the remaining companies were obligated to self-report and self-monitor for the term of the agreement. *Marubeni* agreed to retain an "independent compliance consultant" for a term of two years. The other two companies (*Smith & Nephew* and *Biomet*) were medical device companies that received a hybrid monitor; that is, each of them agreed to a three-year deferred prosecution, but the monitor's term was only eighteen months followed by eighteen months of self-reporting. A monitor was not imposed in the other medical device enforcement, against *Orthofix*.

Second, most of the companies received a generous discount from the Sentencing Guidelines as a reward for cooperation and settlement. In the medical device companies, two of the three companies received a 20% discount from the bottom of the applicable Guidelines range (*Orthofix* is again the outlier here, with no discount), and *BizJet* and *Data Systems & Solutions* received a 30% discount to reflect the companies' "extraordinary" cooperation and remediation in their respective cases. *Marubeni* did not receive a discount, perhaps reflecting that it was the last of the *TSKJ* entities to settle. *Biomet* and *Orthofix* yield an interesting comparison: on the one hand, *Biomet* received a 20% discount even though it only made a "partial" voluntary disclosure but received explicit credit, both in the Guidelines calculation and in the discount, for its substantial assistance in prosecuting other unnamed entities. On the other hand, Orthofix made a full voluntary disclosure, for which it received credit in the Guidelines calculation, but no discount was applied. This may explain why *Orthofix* was the only medical device case this year that was not subject to an independent monitor.

Third, for the first time, the DOJ granted a reduced fine on the basis of potential insolvency. According to *NORDAM*'s NPA, a fine of $2 million, "substantially below the standard range" under the Sentencing Guidelines, was imposed because the company fully demonstrated that a fine exceeding $2 million would "substantially jeopardize the company's continued viability." Interestingly, the NPA did not disclose the extent of the discount applied. In the past, the government has allowed for payments of FCPA-related corporate fines in installments, presumably accounting for the financial health of the company. For example, in the case of *Technip*, the company agreed to pay a $240 million fine in eight equal installments of $30 million. This appears to be the first time, however, that the authorities have clearly stated that a fine was reduced because a higher fine would likely bankrupt the company.

Fourth, the DOJ settlements continue to reflect a sensitivity to the collateral consequences of a conviction. In the past, *e.g.*, in *Siemens*, the government carefully chose the entity to charge with bribery, apparently to minimize the risk that the entire corporate family would be debarred from public contracting in the US or in the E.U. In two of the three medical device cases this year (*Biomet* and *Smith & Nephew*), the government explicitly noted as a justification for resolving the cases through deferred prosecution agreements that "[w]ere the Department to initiate a prosecution . . . and obtain a conviction, instead of entering into this Agreement to defer prosecution, [the company] would potentially be subject to exclusion from participation in federal health care programs . . ."

Finally, in January, Robert Khuzami, the Director of the SEC's Division of Enforcement, announced that the SEC would no longer allow companies to settle on a "neither admit nor deny" basis in certain circumstances, notably where there are parallel criminal enforcement actions in which the defendants admitted to or were convicted of culpable conduct. Indeed, the defendants in the three SEC corporate actions this year so far, *Smith & Nephew*, *Biomet*, and *Orthofix*, all admitted to allegations in their respective parallel DOJ actions, and none settled the SEC actions on a "neither admit nor deny" basis.

Closure

Very few FCPA cases go to trial, but the ones that do tend to be protracted affairs. The first half of 2012 saw some closure, however, with the end of three major cases. The largest FCPA-related sting operation against the *SHOT Show* defendants saw a second mistrial in the beginning of the year, after one mistrial and three acquittals in 2011. The entire case ended early this year, when the government filed a motion to dismiss the remaining indictments with prejudice, saying that continuing the prosecution would be a waste of government resources. As we observed in our previous *Trends and Patterns*, the problems in this case were not FCPA-specific but had more to do with the inherent difficulties of a sting operation, certain evidentiary rulings by the judge, the lack of admissible predisposition evidence against any of the defendants, and the government's decision to try the case as an overarching conspiracy rather than

focusing on smaller conspiracies involving more closely-related defendants.[1] Nonetheless, the outcome of this case and other individual FCPA trials may encourage individuals to take their chances at trial.

Meanwhile, in January of this year, former *ABB* manager *John O'Shea* was acquitted of several charges relating to the alleged bribery of officials at Mexico's state-owned electric utility and covering up the payments. *ABB* had pleaded guilty to FCPA charges in 2010. The case against *O'Shea* ended definitively when the court granted the government's motion to dismiss the remaining counts against *O'Shea* in February 2012. Finally, the case against *Lindsey Manufacturing*, which had been thrown out on the basis of prosecutorial misconduct last year, also concluded after the government dismissed the Ninth Circuit appeal it had filed at the end of 2011. The one conviction in the case, that of *Angela Maria Gomez Aguilar* for money laundering conspiracy, was subsequently vacated in June 2012, pursuant to a December 2011 agreement that the government would dismiss *Gomez Aguilar*'s conviction if it dismissed its appeal as to the remaining *Lindsey* defendants.

Perennial Statutory Issues

Parent/Subsidiary Liability

It is encouraging to note that in all but one case the theory of holding a parent liable for its subsidiary's actions were fairly well spelled out in the government's pleadings. For example, in *Biomet*, the SEC charged that the parent company and its subsidiaries paid bribes, and it alleged in detail facts that established the parent's authorization, direction, and control of the subsidiaries' conduct. These allegations included that the parent company was aware of the bribes being paid to doctors, in part because of concerns raised by one of the subsidiaries' general manager as well as internal audit findings, yet made no effort to stop them.

The exception is *Smith & Nephew*, in which the SEC alleged that Smith & Nephew plc, the parent issuer, had not only violated the books and records and internal controls provisions but that the parent had "*through its subsidiaries*, violated [the FCPA] by making illicit payments to foreign government officials in order to obtain or retain business." This flat allegation, repeated in several places in the complaint, is not supported anywhere in the factual allegations, which describe in detail a complex scheme of payments entirely orchestrated by the subsidiaries and their employees.

It is disappointing, and a continuation of the trend we have noted before, that the SEC, which unquestionably has jurisdiction in these cases over the issuer's books and records and internal controls, nevertheless feels it necessary to stretch for the anti-bribery violation as well in the absence of articulated facts to establish such liability. The DOJ's approach stands in marked contrast. For example, faced with

[1] For a further discussion of these issues, you may wish to refer to our prior client publication, available at Shearman & Sterling, *Recent Trends and Patterns in FCPA Enforcement* (Jan. 3, 2012).

the same facts, the DOJ charged only *Smith & Nephew*'s US subsidiary and not the parent company. In the *BizJet* matter, the DOJ handled this issue by charging only *BizJet*, a subsidiary of *Lufthansa Technik*, but then requiring the parent company to sign a non-prosecution agreement in which it acknowledged, in a general sense, responsibility for its subsidiary's actions and agreed to undertake certain remedial compliance steps. On the other hand, in *Biomet*, the DOJ charged the parent, alleging it had, in fact, "*authorized* the [subsidiary's] payment, directly or indirectly" in part as a result of various communications and financial information between the parent and the subsidiary.

Obtain or Retain Business

In the past we have criticized both the DOJ and the SEC for not articulating the link between the alleged bribe payments and the FCPA's business nexus element, *i.e.*, that the bribe must be intended to "assist . . . in obtaining or retaining business."[2] In particular, we noted the plethora of allegations concerning payments that *could* be interpreted as *either* facilitation payments or "obtain or retain business" payments but where the pleadings failed to provide a basis for determining which. Instead, the government wholesale incorporated these allegations into each of the counts against the companies, thereby alleging, without factual support, that these payments violated not only the books and records provisions but also the anti-bribery provisions.

In our view, some of the blame for this slipshod pleading resulted from the fact that these were settled matters, with the defendant corporations perhaps not interested in or unable to impose clarity on the government's pleadings. One of these cases was against *Noble Corporation*, in which the company was charged with, *inter alia*, having paid off Nigerian customs officials to allow its rigs to remain illegally in the country without being removed and re-imported. It is, therefore, interesting that when the SEC charged two of *Noble*'s executives, *Ruehlen* and *Jackson*, with the same conduct, it explicitly alleged that "through their illicit payments to Nigerian government officials, Noble and Noble-Nigeria *retained* business under lucrative drilling contracts" as well as obtaining profits and avoiding import duties. Not surprisingly, the defendants have moved to dismiss the SEC's complaint, alleging that the payments were, in fact, facilitation payments, a matter that will likely have to be resolved at trial.

Facilitation Payments

On a similar note, the *Ruehlen* and *Jackson* case, assuming it does go to trial will provide one of the first instances in which the scope of the facilitation payments exception will be squarely presented to a fact-finder. It was previously unsuccessfully raised in *United States v. Kay*, another case that involved payments to customs officials, where the evidence showed that the payments caused officials to impose

[2] For a further discussion of these issues, you may wish to refer to our prior client publication, available at Shearman & Sterling, *Recent Trends and Patterns in FCPA Enforcement* (Jan. 20, 2012).

lower duties, thereby reducing the costs of importing the company's rice and allowing it to sell that rice at competitive prices, rather than merely expediting some official action.

The SEC's complaint in *Ruehlen* and *Jackson* appears to anticipate this defense, although somewhat sideways. In the complaint, it notes that Noble Corporation's policy defined a facilitation payment as a "small payment to assure or speed the proper performance of a foreign official's duties that does not involve a discretionary action by such official." The SEC then alleges, "By its terms, the definition excludes large payments, all payments connected with discretionary acts and all payments to induce foreign officials to process and approve false documents." The Noble Corporation's definition is consistent with those we have seen in many other company's policies, but it is, notably, not the one found in the statute itself, which provides only that such payments must be "to expedite or to secure the performance of a routine governmental action" and "does not include any decision whether, or on what terms, to award new business or to continue business." *See* 15 U.S.C. 78dd-1(b) & (f)(3)(B). Meanwhile, in the SEC's opposition to *Ruehlen* and *Jackson*'s motions to dismiss, it no longer makes mention of the size of such a payment, but bases its facilitation payment argument on the non-discretionary nature of the bribe, one of the factors reflected in the 1977 legislative history but not incorporated into the statutory exception in the 1988 amendments. The SEC also argues that "lying on official documents" and basing decisions on "known false documents" cannot be construed as "routine government action."

Instrumentalities

The debate over what constitutes an instrumentality of a foreign government continues. As we noted previously, the argument that, as a matter of law, such instrumentalities are limited to agencies of foreign governments and do not encompass state-owned entities has thus far failed in every instance in which it was presented to a court. It is currently before the Eleventh Circuit in the appeals by *Joel Esquenazi* and *Carlos Rodriguez* in the *Haiti Telecom* case.

The district courts have uniformly held that the nature of the instrumentality is a matter of fact to be decided by the fact-finder, and they have drafted jury instructions to that effect. The results under these instructions have thus far been fairly consistent: the juries in *Lindsay* and *Esquenazi* and *Rodriguez* (*Haiti Telecom*) clearly found the relevant state-owned entities were instrumentalities as part of their verdict, as did the judge in approving the plea in *Nexus* (the court dismissed the *O'Shea* case before it went to the jury).

In the meantime, the government does not appear to have been deterred by the debate. In most of the cases brought in 2012, the relevant government officials were employed by "instrumentalities" such as state health insurance plans (*Orthofix*), a state-owned nuclear plant (*Data Systems & Solutions*), government hospitals (*Biomet* and *Smith & Nephew*), a state-owned real estate development company (*Peterson*), a state-owned oil company (*Marubeni*), and state-owned airlines (*NORDAM*). In each case, the government laid out with more or less detail facts that it believes are sufficient to meet the criteria

established by the district courts. For example, in *Peterson*, the government alleged that the local municipal government owned 100% of the shares of the real estate company and had "incorporated and owned [it] to purchase, hold, manage, and sell the Luwan District government's real-estate investments, and to encourage, facilitate, and coordinate outside investment in the Luwan District." In fact, at least as far as the government is concerned, complete ownership is not prerequisite. In *Marubeni*, although Nigeria LNG Limited, the entity created to develop the Bonny Island Project, was 51% owned by multinational oil companies, the government alleged that it was nevertheless an instrumentality because "[t]hrough the NLNG board members appointed by [another state-owned entity], among other means, the Nigerian government exercised control over NLNG, including but not limited to the ability to block the award of EPC contracts."

Compliance Guidance

Late last year, the Department announced that it would issue guidance on the application of the FCPA and during the first part of this year it has invited groups of various interested parties to listening sessions to discuss the nature and scope of such guidance. We understand that this guidance will be issued before October, when the US is scheduled to issue a written progress report on its implementation of the OECD Working Group on Bribery's recommendations. In the meantime, the DOJ and SEC enforcement actions and the DOJ FCPA Opinions continue to be the best source of guidance as to the government's understanding and enforcement policy with respect to the FCPA.

Gifts and Entertainment

With the London Olympics bearing down on us, and the Brazil World Cup soon to follow, gifts and entertainment are obviously at the forefront of many corporations' compliance attention. As we have discussed in other fora, the FCPA doesn't forbid providing customers the opportunity to attend these events, provided there are sufficient controls in place to ensure that the benefit cannot be construed as a *quid pro quo* for obtaining or retaining business. *See* Urofsky, *Ten Strategies for Paying for Government Clients to Attend the Olympics or Other Sporting Events Without Violating the Foreign Corrupt Practices Act*, The FCPA Report (June 6, 2012). Indeed, although we doubt that it will arrive in time for the Olympics, we understand that the DOJ intends to address gifts and entertainment in its upcoming guidance paper.

The cases brought thus far in 2012 do not materially add to the existing guidance from previous enforcement actions and FCPA Opinions, but they do provide some additional examples of when gifts and entertainment may cross the line from promotion to bribery. For example, in *Orthofix*, both the DOJ and the SEC alleged that the company had provided vacation packages, televisions, laptops, appliances, and a lease for an automobile to doctors to induce them to use the company's products. Similarly, in *Biomet*, the DOJ alleged that the company flew one Chinese official to Switzerland to visit his daughter and sent others on a "training trip" to Spain of which a substantial portion consisted of sightseeing and

entertainment. In *BizJet*, the DOJ's pleadings refer to one instance in which the company gave an official a cell phone and cash. Finally, in *Data Systems & Solutions*, the DOJ criminal information contains reference to paying for officials' vacations and giving an official a Cartier watch worth $2,664.74.

In each of these cases, the gifts and entertainment were of a type and amount, or were accompanied by explicit agreements, that tied the gift to obtaining or retaining business. Where, on the other hand, such promotional expense was truly *bona fide* and legitimately tied to promoting the company, its products, or even its individuals (*i.e.*, networking), gifts and entertainment, hedged with appropriate controls and accurately recorded in the company's books, should not fall afoul of the statute.

Specific Compliance Failures

Several of the cases that were brought thus far in 2012 provide examples of rather startling compliance failures that clearly raised the ire of the enforcement agencies, which spelled them out in some detail in the relevant pleadings.

Compliance Lip-Service: In *Smith & Nephew*, the DOJ alleged that the company learned of the bribes and instructed the distributor to stop paying them, but it failed to take any action to confirm that the bribes had stopped (and indeed they had not).

Accounting and Auditing Red Flags: In *Orthofix*, the government noted that the individual country business unit's marketing costs, which included the payments to doctors, were consistently over budget or disproportionate, yet the parent company took no action to investigate the cause. In *Smith & Nephew*, the company failed to question the reason for paying a third-party distributor for sales in Greece to accounts in the names of entities located outside of Greece. Yet more egregiously, in *Biomet* and in *Ruehlen/Jackson/O'Rouke* (employees of *Noble Corp.*), the government alleged that the companies' Internal Audit knew about the payments, yet company management took no effective action to stop the payments. Indeed, O'Rourke was head of Noble's Internal Audit group and Ruehlen was a member of the audit team—both are alleged to have actively aided and abetted the payments. In *Biomet*, Internal Audit noted that royalties were being paid to hospital employees, yet took no steps to determine why such royalties were paid or why they amounted to fifteen to twenty percent of sales. Even in the face of these questionable payments, Biomet's Internal Audit concluded that there were adequate internal controls in place to properly account for royalties paid to hospital employees without any supporting documentation.

Misleading Audit Committee and Auditors: In *Ruehlen/Jackson/O'Rourke*, the SEC alleged that the defendants attempted to circumvent Noble Corporation's internal controls and to falsely record bribes as operating expenses. Ruehlen, a member of the audit team, allegedly backdated a Nigerian customs agent's certifications of FCPA compliance and used the forged certifications to mislead the head of Internal Audit, O'Rourke. Jackson, Noble's CFO, allegedly failed to inform the Audit Committee and Board of Directors that he was aware of the false documents and payment of bribes to secure business for Noble Corp. Jackson also refused to cooperate with Noble Corp.'s internal investigation and repeatedly signed

allegedly false representation letters to Noble's independent auditors, incorrectly stating that he knew of no fraudulent activity in Noble Corp., that the company's internal controls over financial reporting were adequate, and that he knew of no violations of the FCPA or any other laws.

Ignoring Internal Concerns and Allegations: In *Biomet*, the managing directors of the Argentine and Brazilian subsidiaries repeatedly called attention to the bribes, as did the company's distributor in China. They even used explicit terms such as "bribery" or "kickbacks"—yet company management took no effective action to stop the payments. In *Smith & Nephew*, the company's CFO raised questions with in-house lawyers following questions from internal auditors concerning suspicious payments. The Smith & Nephew lawyers discovered and noted that illegal payments were being made, but the information never resulted in any action to stop such payments.

Training: In *Orthofix*, the government noted that the company had FCPA compliance materials but that they were only in English and had been distributed to employees that did not speak, or were not fluent in, English.

Best Practices

Many critics of the FCPA have called for a "compliance program defense." This seems unlikely, and the recent Wal-Mart bribery scandal in Mexico, which occurred in spite of what appeared on paper to have been a relatively well-established compliance program, may have served to further deter any notion of a complete defense based on existing compliance programs. However, the government authorities have sought to provide incentives for companies to establish strong compliance programs prior to learning of alleged wrongdoing, one such incentive being the discounted fines that can result from pre-existing compliance programs. In April 2012, the government provided its strongest incentive to date, by showing that a strong compliance program could completely shield a company from liability relating to the actions of a single employee. The DOJ and SEC brought actions against *Garth Peterson*, a former managing director of Morgan Stanley Real Estate Group's Shanghai office, for bribery in China.

The authorities did not bring charges against Peterson's employer, noting Morgan Stanley's strong compliance program and the lengths to which Morgan Stanley went to train and remind Peterson of FCPA compliance. In its press release, the DOJ specifically stated, "After considering all the available facts and circumstances, including that Morgan Stanley constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials, the Department of Justice declined to bring any enforcement action against Morgan Stanley related to Peterson's conduct. The company voluntarily disclosed this matter and has cooperated throughout the department's investigation." The SEC stated in its press release that Peterson was a "rogue employee" (which may represent the first government acknowledgement that there are such animals) and that "Morgan Stanley, which is not charged in the matter, cooperated with the SEC's inquiry and conducted a

thorough internal investigation to determine the scope of the improper payment and other misconduct involved."

Specific Remediation

Several of the cases refer to the companies having undertaken remediation (sometimes described as "extraordinary" remediation) without providing too much in the way of details. Much of this remediation likely involves the implementation of better anti-corruption policies, procedures, and controls (sometimes described as "enhanced"). *Lufthansa Technik*, *BizJet*'s parent company, was subject to only a NPA and was not fined, in part thanks to Lufthansa's "extraordinary real-time cooperation with the Government" and its remedial efforts "already undertaken and to be undertaken, including enhancements to its compliance program." In *Orthofix* and *BizJet*, the government specifically noted that the companies had terminated wrongdoing employees and, in the case of *Orthofix*, withdrawn from the business before re-entering the country with a new organization and controls.

Private Litigation

The first half of 2012 saw a slew of private litigation related to FCPA investigations and enforcement. While most were the usual derivative lawsuits that follow FCPA disclosures (with several arising from the Wal-Mart scandal), one of them was a rare FCPA-related malpractice case. *Watts Water Technologies Inc.*, which had settled FCPA allegations last year concerning an acquisition of a Chinese entity in 2005, launched a malpractice suit against its advisor on the Chinese acquisition, Sidley Austin LLP. Watts Water alleged that Sidley Austin failed to warn it about possible corruption issues, even though its review of the transaction had uncovered "a suspicious document." Watts Water also alleged that it would not have executed the acquisition if it had known about the Chinese company's written policy of paying kickbacks to Chinese government officials—which Sidley Austin allegedly uncovered but did not reveal to Watts Water.

As for those derivative lawsuits, they may be impacted by the settlement signed between SciClone Pharmaceuticals Inc. and its shareholders in a FCPA derivative lawsuit. In late 2011, SciClone agreed to pay $2.5 million in attorneys' fees and implement and maintain an extensive compliance program. A detailed plan for the new compliance infrastructure was set out in the settlement agreement.

Enforcement in the United Kingdom

Deferred Prosecution Agreements (DPAs)

On May 17, 2012, the Ministry of Justice (MoJ) published a consultation paper on deferred prosecution agreements. While DPAs have long been used by prosecutors in the US, the adoption of an alternative

negotiated resolution in criminal matters would be a significant departure in the UK. The MoJ has invited interested parties to comment on its proposals to help determine whether they are sensible, proportionate and likely to make a genuine difference. The deadline for responding to the consultation is August 9, 2012.

A DPA, as contemplated by the MoJ, is an agreement between a prosecutor and a commercial organization[3] under which the prosecutor will bring, but not immediately proceed with, criminal charges against the organization. In a significant departure from US practice, the MoJ's consultation paper contemplates that the courts will be involved and will hold a number of formal proceedings before approving the terms of the DPA. If approved by the court, the prosecution will only proceed if the commercial organization fails to meet certain agreed terms and conditions as stated in the DPA. The agreed terms and conditions are likely to include financial penalties, reparation to victims, confiscation of the profits of wrongdoing, and measures to prevent future offending. While the consultation paper refers to "commercial organizations," the MoJ states that "many of the difficulties [referred to in the consultation paper] apply with equal force to large partnerships or trusts."

Currently, prosecutors in the UK can either bring a formal prosecution against a commercial organization for committing a criminal offense or pursue a civil recovery order. Both of these options can be expensive, involve lengthy investigations, and in many instances are regarded as ineffective. The MoJ states that the purpose of DPAs is to give prosecutors the "flexibility to secure appropriate penalties for wrongdoing, at the same time as achieving better outcomes for victims" without the costs, uncertainty, and risks involved in formal criminal prosecutions. The MoJ also hopes that DPAs will encourage organizations to self-report economic crime, with the incentive for doing so being to defer, and possibly avoid, criminal prosecution. However, self-reporting by itself cannot guarantee a decision will be made not to prosecute. David Green QC, Director of the Serious Fraud Office (SFO), has suggested in a recent speech that the SFO's policy in relation to DPAs will be to reserve them for admissions by corporations that are "realistic and factual."

Anti-Bribery and Corruption Systems and Controls

On March 29, 2012, the UK Financial Services Authority (FSA) published the findings of its thematic review into anti-bribery and corruption ("ABC") systems and controls in investment banks.

The FSA examined the effectiveness of the ABC controls of a group comprised of eight global investment banks and seven other smaller operations offering investment banking or similar activities for a period from August 2011. The FSA's findings included the following:

- Most of the group had not yet properly taken account of the FSA's existing rules relating to ABC;

[3] It appears that the proposals in the consultation paper will not enable the Serious Fraud Office to enter into DPAs with individuals who are investigated for economic crimes.

- Nearly half the group did not have an adequate ABC risk assessment;
- Information provided on ABC by the group to senior management was generally poor; and
- Most of the group had not yet devised mechanisms for reviewing or monitoring the effectiveness of their ABC policies and procedures.

Overall, the FSA concluded that the investment banking sector has been "too slow and reactive in managing bribery and corruption risk." The FSA is now considering possible regulatory action against some members of the group, and it has also launched a consultation on changes it is proposing to make to its guidance in this area.

Oxford Publishing Ltd

Oxford Publishing Ltd ("OPL"), a wholly owned subsidiary of Oxford University Press ("OUP"), agreed to pay almost £1.9 million under a civil recovery order in the High Court. This amount reflects sums generated through unlawful conduct related to OPL's subsidiaries in Tanzania and Kenya. The two subsidiaries have also been excluded from competing for World Bank contracts for three years. OUP has offered to contribute £2 million to not-for-profit organizations in sub-Saharan Africa and will be subject to a compliance monitor who will report to the SFO on compliance in twelve months' time.

This case represents an example of how, even without the availability of DPAs, the SFO has some flexibility in reaching alternative resolutions with cooperating corporations. In this case, it determined that the case was appropriate for a civil recovery order instead of a criminal prosecution because OUP met the criteria set out in the SFO guidance on self-reporting matters of overseas corruption, the settlement terms ensure all gross profit from any tainted contract will be disgorged, and there was no evidence of Board-level knowledge or connivance in relation to the business practices which led to the case being referred to the SFO. Thus, in announcing the settlement, the new Director of the SFO, David Green, stated "[t]his settlement demonstrates that there are, in appropriate cases, clear and sensible solutions available to those who self report issues of this kind to the authorities."

Innospec

Earlier this year, the former chief executive, *Paul Jennings*, and former marketing director, *David Turner*, of *Innospec Ltd*, pleaded guilty in the UK to bribery offenses. Three convictions have therefore now been secured in the SFO's investigation into *Innospec*. In 2010, *Innospec* admitted bribing Indonesian government officials following charges brought by the SFO, and agreed to a £8.2 million plea bargain with the SFO. Also in 2010, *Innospec* settled with the US authorities, paying over $25 million in criminal and civil fines.

In January 2012, *David Turner* pleaded guilty to three charges of conspiracy to corrupt. Subsequently, in June 2012, *Paul Jennings* pleaded guilty to two charges of conspiracy to make corrupt payments to officials in Indonesia and Iraq to secure contracts for Innospec Ltd for the supply of its products. *Jennings* and *Turner* have also agreed to pay sums to settle related claims brought against them by US prosecutors. Two other former directors of *Innospec* are awaiting trial.

Jennings, *Turner*, and one of *Innospec's* agents, *Ousama Naaman*, had previously been subject to enforcement actions by US authorities. In January 2011, *Jennings* entered into a civil settlement with the SEC and paid $229,037 in disgorgement, prejudgment interest, and civil penalties. In August 2010, *Turner* also entered into a civil settlement with the SEC and paid $40,000 in disgorgement. Pursuant to a civil settlement in 2010, *Naaman* was ordered to pay about $1.3 million in disgorgement, prejudgment interest, and civil penalties. *Naaman* also pleaded guilty to criminal charges brought by the DOJ, and in December 2011, he was sentenced to thirty months in prison and a $250,000 criminal fine.

Mabey & Johnson

In another long-running SFO investigation, a shareholder of Mabey & Johnson has agreed to pay back dividends exceeding £130,000 which were gained as a result of bridge-building contracts in Iraq obtained through unlawful conduct. The director of the SFO stated that this represented "the final piece in an exemplary model of self-reporting and cooperative resolution. This is the approach I would like to foster across the wider business community when it comes to the self-referral processes the SFO has created. The process should provide clarity, confidence and, ultimately for the business concerned, a resolution to the problem."

OECD Working Group on Bribery

According to the OECD Working Group on Bribery, fourteen (out of thirty-eight) OECD members have prosecuted 210 individuals and 90 entities since the OECD Convention entered into force in 1999, with 66 individuals being sentenced to imprisonment. Moreover, the OECD reports that there are over 170 ongoing criminal proceedings in thirteen Parties, and over 300 ongoing investigations by twenty-six Parties (although half of those appear to be in the US). Enforcement is not, of course, uniformly distributed, with a significant number of Parties reporting no cases, no proceedings, and no investigations. Nevertheless, it does appear that, even if other countries are not publicizing their enforcement actions to the extent done in the US (and thus perhaps losing the deterrent value of such prosecutions), there are a growing number of cases being brought outside the US.

The OECD data is subject to a number of qualifications as to accuracy and methodology that makes it hard to necessarily compare countries. For example, unlike our approach above of aggregating cases against related entities and not double-counting civil and criminal cases against the same individuals, this data counts each entity and each action separately and thus potentially overstates the extent of enforcement.

However, the five most active countries are the United States, Germany, Italy, Hungary, and Korea. Several others have a few cases. Perhaps most surprising is that two countries not viewed as being particularly active in this area, Japan and France, have both allegedly brought six and seven cases, respectively!

FCPA "Reform"

The topic of FCPA reform was very much in the spotlight in 2011 after the House of Representatives Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on FCPA enforcement and reform proposals. But while several representatives followed that hearing with announcements that they planned to introduce legislation that would clarify parts of the FCPA, these plans have, so far, come to naught. One possible reason that legislators are not actively moving on reform is that they are awaiting detailed new FCPA guidance promised by Assistant Attorney General Larry Breuer last November. To date, the DOJ has released a list of topics that it expects the Guidance will cover (including interagency and international cooperation, compliance programs, penalties and enforcement, and definitions of key terms) and has consulted with business groups and other interested parties to gather input on the issues it will address. As noted above, we expect this Guidance to be issued in Fall 2012.

Congress may have postponed FCPA reform for another day, but the US Chamber of Commerce has not slowed its intense lobbying efforts. In February, the Chamber, joined by more than thirty trade associations, sent a public letter to Breuer and SEC Director of Enforcement Robert Khuzami requesting that the DOJ's new guidance address "several issues and questions of significant concern to businesses." Most of these issues are familiar from the Chamber's 2010 policy paper, which called for clearer definitions of the FCPA's terms, limitations on liability for acts of subsidiaries and acquirees, and a compliance defense, among other proposed amendments to the statute. The Chamber's February letter came only a week after Senators Amy Klobuchar (D-Minn.) and Chris Coons (D-Del.) sent a public letter to Attorney General Eric Holder, also requesting specific guidance on many of these same issues.

The Chamber's position, however, is looking rockier than it did last year, particularly in the wake of the Wal-Mart scandal. In May 2012, US House of Representatives members Elijah Cummings (D-Md.), and Henry Waxman (D-Calif.) sent a letter to the Chamber noting that two high-level Wal-Mart executives sit on the board of its legal reform group, the Institute for Legal Reform (ILR), and seeking more information about ILR's members and activities. The request came after a review of ILR's tax filings revealed that fourteen of the 55 ILR board members between 2007 and 2010 were affiliated with companies that were reportedly under investigation for violations or had settled allegations that they violated the FCPA.

At the same time as the Chamber's motives have come under scrutiny, opponents of FCPA reform have taken a more public stance in support of their position. In January, more than thirty-three non-governmental organizations sent a letter to every member of Congress opposing amendment of the FCPA

on the grounds that narrowing the law would significantly undermine its efficacy as a tool to curb corruption. More recently, a coalition of transparency advocacy organizations sent a public letter to Breuer and Khuzami responding to the Chamber's February letter point-by-point, and asking the DOJ to reject most of the Chamber's proposals (approving only the proposal that the DOJ release information on declinations). Notably, US Secretary of State Hillary Clinton also joined the debate, remarking at the Transparency International-USA's Annual Integrity Award Dinner in March that the executive branch is "unequivocally opposed to weakening the Foreign Corrupt Practices Act."

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