

FCPA and Anti-Corruption Enforcement Update: April – September 2012

By John Hynes

2012 has proven to be yet another banner year in anti-corruption and Foreign Corrupt Practices Act ("FCPA") enforcement. This update highlights recent developments relating to FCPA trials, FCPA settlements, FCPA investigations, and other significant aspects of the anti-corruption world.

FCPA Trials

Case Against CCI Nears End After Five of Six Defendants Plead Guilty

In 2009, the Department of Justice ("DOJ") charged six employees of Controlled Components, Inc. ("CCI") with various FCPA violations for allegedly paying \$4.9 million in bribes to officials of state-owned oil, electricity, and nuclear energy companies in China, Malaysia, and the United Arab Emirates, leading to \$46.5 million in net profits for CCI. CCI's former vice president of sales pled guilty in April 2011, the former president and his wife pled guilty in April 2012, the former head of worldwide sales pled guilty in May 2012, and the former VP of worldwide customer service pled guilty in June 2012. These individuals face as much as 15 months in prison. One remaining defendant, a former CCI Korea employee, remains in South Korea and has not been brought before the court.

Haiti Telco Defendants Appeal Convictions, Focus on FCPA Definition of "Foreign Official"

In August 2011, a federal jury convicted the former president and the former vice president of Miami-based Terra Telecommunications Corp. ("Terra") of FCPA violations for paying more than \$890,000 in bribes to officials of Telecommunications D' Haiti ("Haiti Telco"), Haiti's state-owned telecommunications company, in exchange for business. The former president was sentenced to 15 years in prison (the longest FCPA sentence in history) and the vice president was sentenced to a prison term of nine years. Both defendants appealed their convictions to the 11th Circuit, arguing that their convictions should be reversed because employees of Haiti Telco do not constitute "foreign officials" under the FCPA. This is the first time a federal appellate court has been called upon to interpret the term "foreign official" in the FCPA.

Three More LatiNode Executives Sentenced in Honduran Telecom Bribery Scheme

In 2009, LatiNode pled guilty to one count of violating the FCPA for paying bribes to Honduran telecommunications officials in exchange for contracts and preferred telecommunications rates. In April 2012, the company's former chief commercial executive and VP of sales was sentenced to three years of probation, six months of home confinement, and a \$7,500 fine, and the company's former VP of business development was sentenced to 23 months in prison. In June 2012, the company's former CFO was sentenced to 10 months in prison plus three years of supervised release. All three men pled guilty in 2011 along with the former CEO, who was sentenced to 46 months in prison.

DOJ and SEC Decline to Charge Morgan Stanley, Former Executive Sentenced to Nine Months

In April 2012, the SEC and DOJ filed FCPA charges against Garth R. Peterson, the former managing director of Morgan Stanley's real estate investment and fund advisory business in China. Peterson, an American citizen living in Singapore, was accused of convincing Morgan Stanley to sell a multi-million dollar ownership stake in Shanghai real estate at a discount to a state-owned Chinese company. In fact, the property was sold to a shell company secretly owned by Peterson, a Chinese official, and a Canadian co-conspirator. The sale was alleged to have generated \$2.5 million in profit for the conspirators.

Peterson pled guilty in August 2012 to one count of conspiring to violate the books and records and internal controls provisions of the FCPA and was sentenced to nine months in prison. Peterson also settled the SEC's civil complaint against him and paid \$250,000 in disgorgement and forfeited real estate in Shanghai worth \$3.4 million. The SEC and DOJ declined to proceed against Morgan Stanley because the company had a strong compliance program in place and the government characterized Peterson as a rogue employee.

DOJ Dismisses its Appeal, Ending Failed Prosecution of Lindsey Manufacturing Executives

In May 2011, a federal jury convicted two executives of Lindsey Manufacturing Co. of violations of the FCPA for paying \$5.9 million in bribes through a Mexican sales representative to officials of Comisión Federal de Electricidad ("CFE") – a Mexican state-owned electric utility company – in exchange for contracts. In November 2011, the judge threw out the convictions on prosecutorial misconduct grounds. While the government initially appealed the court's decision, it voluntarily dismissed the appeal in May 2012, bringing the prosecution to a close. Once the government dismissed its appeal, the court vacated an earlier money laundering conviction in the same case against the wife of the Mexican sales representative through whom Lindsey allegedly funneled bribes to CFE officials.

Cooperating Witness in Africa Sting Trials Sentenced to 18 Months in Prison

In the now infamous SHOT Show sting case, undercover FBI agents posed as officials from Gabon seeking \$1.5 billion in bribes in exchange for a \$15 billion defense contract. The sting led the DOJ to charge 22 defendants with FCPA-related offenses, but the prosecution collapsed when the first two trials failed to net any convictions. In March 2012, the DOJ moved to voluntarily dismiss all remaining indictments with prejudice.

In 2010, the former VP of international sales for Armor Holdings, Inc., Richard Bistrong, pled guilty to FCPA charges in connection with the sting operation and began assisting the government in the prosecution. In July 2012, Bistrong was sentenced to 18 months in prison and 36 months of probation for his role in the scheme, even though the DOJ had requested that Bistrong be spared prison time due to his "extraordinary cooperation."

Key Cooperating Witness in ABB Case Sentenced to Time Served

In April 2012, Fernando Basurto, Jr., the DOJ's key witness against former ABB manager John O'Shea, was sentenced to time served for conspiracy to violate the FCPA. The sentence limited his punishment to the 22 months he had spent in jail following his 2009 arrest.

A federal judge dismissed the DOJ's FCPA case against O'Shea in January, finding that Basurto knew "almost nothing" and his testimony was vague and inadequate. The DOJ had accused O'Shea of using Basurto's company to funnel bribes to officials with Mexico's Comisión Federal de Electricidad ("CFE") in exchange for a contract.

O'Shea worked for a U.S. unit of ABB Group, a large multinational electrical technology corporation headquartered in Switzerland.

FCPA Settlements

Pfizer, Wyeth Agree to Pay More Than \$60 Million to Settle Criminal and Civil Cases

In August 2012, pharmaceutical manufacturer Pfizer Inc. agreed to pay a total of \$60 million to settle DOJ and SEC charges that Pfizer and its subsidiaries bribed officials in Europe and Asia. In the DOJ case, a Pfizer subsidiary entered into a deferred prosecution agreement and agreed to pay a \$15 million penalty to resolve FCPA-related charges. The subsidiary admitted that between 1997 and 2006, it paid more than \$2 million in bribes to officials in Bulgaria, Croatia, Kazakhstan, and Russia that resulted in more than \$7 million in profits.

In the civil case, Pfizer agreed to pay more than \$26.3 million in disgorgement of profits, including prejudgment interest, and Wyeth LLC, which was acquired by Pfizer in 2009, agreed to an \$18.8 million settlement. The SEC complaint alleged widespread misconduct dating back to 2001, including cash payments and illegal incentive programs. Allegations included a rewards club for "high-prescribing" Chinese doctors; a bonus program for doctors in Croatia; and payments of cash, BlackBerry's, and travel incentives to doctors and other officials in China, Indonesia, Pakistan, and Saudi Arabia.

Nuclear Services Company Agrees to Pay \$8.82 Million to Resolve DOJ Corruption Charges

In June 2012, Data Systems & Solutions LLC ("DS&S") resolved FCPA charges by agreeing to pay \$8.82 million and entering into a two-year deferred prosecution agreement with the DOJ. DS&S, a Virginia-based company that provided design, maintenance, and other services at nuclear and fossil fuel power plants, was charged with one count of violating the FCPA and one count of conspiracy to violate the FCPA. The DOJ accused DS&S of paying hundreds of thousands of dollars in bribes to officials at the state-owned Ignalina Nuclear Power Plant in Lithuania in exchange for tens of millions of dollars in contracts from 1999 to 2004. DS&S, renamed Optimized Systems and Solutions LLC, is a subsidiary of U.K.-based Rolls Royce. Only DS&S was named in the enforcement action.

Orthofix Agrees to \$7.4 Million in FCPA Settlements with DOJ and SEC

In July 2012, Orthofix International N.V., a Texas-based medical device company, agreed to pay \$5.2 million, including prejudgment interest, to settle FCPA charges with the SEC. The company also paid \$2.22 million and entered into a three-year deferred prosecution agreement to resolve criminal FCPA charges with the DOJ.

Orthofix's Mexican subsidiary, Promeca S.A. de C.V., allegedly bribed officials with the Instituto Mexicano del Seguro Social ("IMSS"), Mexico's state-run health care and social services system. From 2003 to 2010, Promeca employees allegedly paid a total of \$317,000 in cash and gifts to secure sales contracts with government hospitals, which allegedly yielded \$8.7 million in gross revenue and \$4.9 million in profit.

NORDAM Settles China Airlines Bribe Case for \$2 Million, A Fine "Below the Standard Range"

In July 2012, NORDAM Group Inc., a privately held aircraft maintenance company, entered into a three-year non-prosecution agreement with the DOJ and agreed to pay \$2 million to resolve FCPA charges. In the agreement, NORDAM admitted that from 1999 until 2008, it caused bribes to be paid to employees of state-run airlines in China in exchange for new contracts and continued business. NORDAM paid as high much as \$1.5 million in bribes to obtain about \$2.48 million in profits from the state-run entities.

The DOJ explained that a "fine below the standard range" was appropriate in this case because NORDAM had proven that a larger fine would jeopardize the company's viability. Furthermore, NORDAM had voluntarily, promptly, and thoroughly disclosed the misconduct and cooperated with the DOJ.

Oracle Agrees to \$2 Million Civil Penalty to Settle India Slush Fund Charges

In August 2012, California software company, Oracle, agreed to pay a \$2 million civil penalty to settle FCPA books and records and internal control charges brought by the SEC related to Oracle's Indian subsidiary, Oracle India Private Ltd. ("Oracle India"). Oracle India sold software licenses and services to the Indian government through local distributors. Oracle allegedly structured the transactions so that it could park excess side funds with Indian distributors and keep them off of Oracle's books. The DOJ did not bring any criminal charges against Oracle.

Former Digi International CFO Settles FCPA Charges

In September 2012, the SEC filed a civil injunctive action in a Minnesota federal court against Subramanian Krishnan, the former CFO of Digi International, Inc., a developer of wireless networking solutions. The SEC alleges that Krishnan violated the books and records and internal control provisions of the FCPA by using corporate funds to pay for unauthorized travel and entertainment expenses for Digi employees. According to the SEC, Krishnan developed a system allowing employees in the company's Hong Kong office to be reimbursed for personal expenses without approval by the CEO as required by company policy and approved cash payments in the Hong Kong office that were not supported by documentation.

Krishnan consented to a final judgment, without admitting or denying the allegations, which bars him from serving as an officer or director of any issuer. The duration of the bar and the amount of the civil penalty and disgorgement is to be determined at a later date.

Tyco International Settles Criminal and Civil FCPA Charges

In September 2012, Tyco International Ltd., a Switzerland-based manufacturer of fire security products, agreed to pay more than \$13.6 million in criminal penalties to the DOJ and \$13 million in civil penalties to the SEC to settle FCPA charges. The DOJ alleged that a Tyco subsidiary in the Middle East paid bribes to officials of Saudi Aramco, an oil and gas company controlled by the Saudi Arabian government, in exchange for contracts. In the civil case, the SEC alleged that Tyco paid bribes in Germany, China, Thailand, and Turkey, and falsely recorded payments to agents and other third parties as “commissions.”

The DOJ entered into a non-prosecution agreement with Tyco due to the company’s timely, voluntary, and complete disclosure, and its cooperation and extensive remediation.

Other Important FCPA and Anti-Corruption Developments

Noble Executives Fight FCPA Allegations in a Rare Move in an SEC Case

In May 2012, two former oil executives at Noble Corp. moved to dismiss FCPA complaints filed against them by the SEC in February. Their move is unique as the overwhelming majority of SEC defendants opt to quickly settle SEC enforcement actions. Experts say this is the first time since 2002 that individual defendants have gone to court to battle FCPA charges against the SEC.

The SEC alleges that former Noble CEO Mark A. Jackson and James J. Ruehlen, head of Noble's subsidiary in Nigeria, engaged in a scheme to pay Nigerian customs officials hundreds of thousands of dollars in bribes to process false documents. Jackson and Ruehlen both contend that the SEC failed to state a claim in its complaints against them.

In February 2012, Thomas F. O'Rourke, Noble's former controller and head of internal audit, agreed to pay a \$35,000 penalty to settle the FCPA complaint against him. In 2010, Noble paid \$8.1 million to settle FCPA charges against the company.

Judge Throws Out Claim of GE Whistleblower Who Alleged FCPA Violations in Iraq

In July 2012, a federal judge threw out a whistleblower claim against GE Energy (USA) by a former employee who claimed he was fired for reporting FCPA violations in Iraq to a supervisor and company ombudsman. Khaled Asadi, a former country manager for Iraq, alleged the retaliation occurred after he raised FCPA compliance concerns while GE was seeking a seven-year \$250 million contract with Iraq's Ministry of Electricity. Asadi, a dual citizen of the U.S. and Iraq, was based in Jordan. The judge in Houston held that Dodd-Frank's Anti-Whistleblower Retaliation provisions did not cover Asadi's extraterritorial whistleblowing activity.

In July 2010, GE settled separate FCPA allegations with the SEC relating to its business in Iraq. GE agreed to pay \$23.4 million for an alleged kickbacks-for-contracts scheme.

Watts Water Sues Law Firm, Claims Malpractice Led to FCPA Violations

In June 2012, Watts Water Technologies, Inc., a public company that manufactures water valves, sued its law firm, Sidley Austin, claiming lawyers' mistakes resulted in Watts' being fined for FCPA violations. This is one of the first legal malpractice suits involving the FCPA.

In October 2011, Watts agreed to pay \$3.7 million to resolve SEC allegations that a Watts subsidiary in China, Changsha Valve Works, bribed Chinese officials in exchange for contracts. Before acquiring the Chinese subsidiary for \$9 million, Watts hired Sidley Austin to vet Changsha. Watts contends that the lawyers uncovered suspicious documents and should have informed Watts about the potential for FCPA troubles. More specifically, Watts claims that the lawyers reviewed a document that described Changsha's express written policy of paying kickbacks to Chinese officials in exchange for government contracts. Watts contends that if it had known about this policy, it would never have acquired Changsha. Sidley Austin charged Watts \$200,000 for performing due diligence in connection with the acquisition.

Ex-Innospec CEO Pleads Guilty to Bribery Conspiracy Charges in U.K. Court

In June 2012, Paul Jennings, the former CEO of Innospec's U.K. operations, pled guilty in a London court to two counts of conspiracy to corrupt in relation to bribery schemes in Indonesia and Iraq. Two other former senior executives, Dennis Kerrison and Miltiades Papachristos, pled not guilty. Jennings is the third former Innospec executive to plead guilty to corruption charges. David Turner, a former sales and marketing director, pled guilty in January 2012, and Ousama Naaman, Innospec's Iraq agent, pled guilty in 2011.

Jennings was never criminally charged in the U.S., but paid about \$230,000 in disgorged profits, interest, and civil penalties to settle a civil case with the SEC in January 2011. In 2010, Innospec, a specialty chemical maker based in Delaware, agreed to pay \$40 million to settle more than a dozen criminal charges in the U.S. and the U.K. The charges included FCPA violations, U.N. oil-for-food program offenses, and violations of the U.S. embargo against Cuba.

Halliburton Discloses New Internal Investigation into Alleged Bribes in Iraq and Angola

In July 2012, Halliburton announced that it has initiated a new internal investigation into allegations that it paid bribes in Iraq and Angola in exchange for customs and visa clearances. This internal investigation is separate from the one disclosed by Halliburton in October 2011 concerning a whistleblower's accusations that employees bribed Angolan officials for oil contracts.

Halliburton, an oil and gas services company with operations in more than 70 countries, and its former subsidiary, KBR, paid \$579 million to settle unrelated FCPA charges in February 2009 – the second largest FCPA-related settlement of all time.

Israel's Teva Pharmaceuticals Subpoenaed in SEC Investigation

In August 2012, Israel's Teva Pharmaceutical Industries Ltd. disclosed that it was subpoenaed in July by the SEC regarding possible FCPA violations in Latin America. Teva, a pharmaceuticals manufacturer and one of the largest companies in Israel, said in an SEC filing that it is cooperating with the SEC and conducting its own internal investigation. The company did not provide any further details about the investigation or the subpoena.

Rupert Murdoch Enhancing Anti-Bribery Training and Compliance Following News Corp. Scandal

In August 2012, Rupert Murdoch, head of News Corp., announced in a memo to employees that he is strengthening the company's anti-bribery training and reviewing and improving compliance programs in the aftermath of the company's phone hacking and corruption scandal. Murdoch wrote, "We recognise that strengthening our compliance programs will take time and resources, but the costs of non-compliance – in terms of reputational harm, investigations, lawsuits, and distraction from our mission to deliver on our promise to consumers – are far more serious." British police have arrested 14 current and former journalists at News Corp.'s *The Sun* newspaper. The SFO and FBI are both investigating allegations that reporters bribed police and public officials for confidential information. The SFO and FBI are both investigating the bribery allegations.

WW Grainger Completes Investigation, Says No FCPA Violations Found

In July 2012, WW Grainger, a global industrial supply distributor, announced that it had completed its internal investigation into potential FCPA issues. Grainger announced the investigation did not substantiate allegations that sales agents for the company's China subsidiary had bribed customers with prepaid gift cards. The company said it could not predict at this time whether the SEC or DOJ would take any regulatory action.

Nordion Discloses Internal Investigation into Potential FCPA Violations

In September 2012, Ontario, Canada- based Nordion, Inc., a manufacturer of cancer-treatment products, disclosed in an SEC filing that it is investigating a foreign supplier and other third parties for potential FCPA issues. The disclosure did not include any further facts surrounding the potential violations.

Harris Corporation Discloses FCPA Investigation

In August 2012, Harris Corporation, a Florida-based communications and information technology company, disclosed in an SEC filing that after acquiring Carefx, it discovered certain entertainment, travel, and other expenses in connection with Carefx's China operations that may have been improper and not accounted for correctly. In its subsequent investigation, Harris learned that certain Carefx employees provided pre-paid gift cards and other gifts and payments to potential and actual customers in China. In response, Harris took remedial action relating to

Carefx's China operations, including changes to internal control procedures, termination of its gift-giving practice, additional compliance training, and termination of the individuals involved in the payments. The disclosure further states that Harris has voluntarily disclosed its investigation to the SEC and DOJ.

Layne Christensen Discloses Suspicious Payments

In September 2012, Layne Christensen announced in an SEC filing that the company was investigating the propriety of certain payments by the company to agents and other third parties who dealt with government officials in Africa. The investigation uncovered documents and information indicating that payments in violation of the FCPA may have been made over a considerable period of time relating to the payment of taxes, the importing of equipment, and the employment of expatriates. The company has voluntarily disclosed the investigation to the SEC and DOJ.

Alcoa and Alba Settle Bribery Lawsuit

In October 2012, Alcoa and the state-owned Aluminum Bahrain B.S.C. ("Alba") settled a civil lawsuit accusing Alcoa of bribing Alba officials and overcharging for the supply of raw materials. Alcoa agreed to pay Alba \$85 million to settle the suit.

Alba filed suit in 2008 in a Pittsburgh federal court alleging that Alcoa engaged in a 15-year conspiracy of overcharging, fraud, and bribery in which more than \$2 billion in Alba's payments to Alcoa for raw materials was passed to small companies in Singapore, Switzerland, and the Isle of Guernsey, and that some of the monies were used to bribe Bahraini officials who assisted in obtaining the contracts. The suit alleged common law fraud and violations of the Racketeer Influenced & Corrupt Organizations Act.

Bahrain's own investigation centered on the country's former minister of petroleum and chairman of Alba, as well as a Jordan-born Canadian businessman who acted as Alcoa's agent in Bahrain and was arrested in London in 2011 for bribing Alba officials. Earlier in 2012, the former CEO of Alba was charged in London with accepting bribes.

The DOJ's investigation into this matter is pending.

Conclusion

As shown above, the government remains focused on enforcing the FCPA to eradicate international corruption. Some important FCPA and anti-corruption developments in 2012 include continued cooperation between international regulatory bodies in combating corruption, the government's focus on prosecuting individuals for FCPA violations, and FCPA settlements that highlight the importance of having in place a robust and current anti-corruption program.

To minimize the risk of running into FCPA or other anti-corruption issues in the future, and soften the blow in the unfortunate event that they find themselves in the middle of a government

investigation, companies must ensure that their compliance programs contain all the elements necessary to prevent and detect corruption and that they are periodically reviewed and updated to adapt to the ever-changing anti-corruption landscape that we find ourselves in as governments from around the globe strive to eliminate corruption.