



As DOJ Confronts Setbacks in Litigated FCPA Cases, The Government's Overall FCPA Enforcement Program Faces Increasing Scrutiny

February 16, 2012

Just as the Department of Justice ("DOJ") is confronting a series of defeats in criminal FCPA cases against defendants who have put DOJ to its burden of proof at trial, the government's overall FCPA enforcement program is facing growing pressure to provide guidance about its priorities and expectations. DOJ announced last November that it would be releasing such guidance, but the nature and timing of the guidance remain uncertain. While the impact of DOJ's recent setbacks in some of its most prominent FCPA cases also remains to be seen, if the sizeable corporate FCPA settlements that have been announced in recent months are any indication, the government's FCPA enforcement efforts remain as active as ever.

RECENT SETBACKS IN LITIGATED FCPA CASES

As an increasing number of defendants charged with criminal FCPA violations have elected to litigate the allegations, the government's ability to prove these charges in court has been tested like never before, and the results for DOJ have not been good. In only the last four months, DOJ has suffered major defeats in three of the most closely watched FCPA cases in recent years.

Last December, a federal judge vacated the high-profile FCPA convictions of Lindsey Manufacturing and its CEO Keith Lindsey and CFO Steven Lee, in connection with alleged bribes paid to officials of Mexico's state-owned electric utility. Although the government convinced a jury in Los Angeles to convict Lindsey Manufacturing and its two executives, the presiding judge dismissed the charges, finding that the government had provided false information in connection with obtaining a search warrant, violated its discovery obligations, and allowed an FBI agent to testify untruthfully before a grand jury.

Last month, another judge dismissed all of DOJ's substantive FCPA charges against John O'Shea, the former general manager of the Texas-based unit of ABB Ltd., the Swiss electrical technology and engineering company. The judge ruled that the evidence was insufficient when, among other things, the Government's main witness could not connect O'Shea to the alleged bribery activity. Instead of proceeding on the remaining counts (including money laundering and falsifying records), DOJ essentially walked away from the case last week by moving to dismiss the entire indictment.

Finally, a few weeks ago, one of DOJ's marquee FCPA cases – the so-called "Shot Show" case, involving bribery in the military and law enforcement products industry – was dealt another substantial blow. The case began in January 2010 with the first known large scale sting operation in an FCPA case, the widely publicized arrests of 22 people (many of whom were attending a trade show at the time), and DOJ's pronouncement that it was a "turning point" in

the government's FCPA enforcement program. Last summer, however, the first trial stemming from the case ended in a mistrial when the jury was unable to reach a verdict on any count against any of the four defendants. Then, last December, in the second trial arising from the sting operation, the judge dismissed conspiracy charges against all six trial defendants, resulting in the complete acquittal of the one defendant charged only with conspiracy. And late last month, a jury acquitted two of the other defendants from the second trial and a federal judge declared a mistrial with respect to the three remaining defendants. To date, only three "Shot Show" defendants have pleaded guilty.

GROWING CALLS FOR REFORM AND DOJ'S ANTICIPATED GUIDANCE

These judicial setbacks have come at the same time that DOJ's FCPA enforcement program has been facing mounting criticism from both Congress and the business community. The U.S. Chamber of Commerce has been particularly outspoken in urging FCPA reform, arguing that aggressive FCPA enforcement burdens U.S. companies with significant expense and hampers their ability to compete with foreign counterparts. In particular, last October the Chamber of Commerce proposed a series of amendments to the FCPA that would require the Government to define "foreign official" under the statute, add a defense based on corporate compliance programs that are designed to prohibit bribery, limit a successor's liability for actions of acquired companies, include a willfulness element, and limit a company's liability for the actions of subsidiaries.

Federal lawmakers have also called for legislative FCPA reform. Congressman Jim Sensenbrenner, Chairman of the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, announced last summer that he would introduce legislation to amend the FCPA. Last week, Congressman Bobby Scott, ranking member of the Subcommittee, stated that he had concerns about FCPA enforcement but hoped that the release of the anticipated FCPA guidance from DOJ would alleviate the need for legislative reform.

DOJ announced its plans to issue this guidance last November. While DOJ did not provide a time frame, it will mark the first official guidance (outside of DOJ's FCPA opinion procedure) relating to the FCPA in many years.

DOJ AND SEC CONTINUE TO OBTAIN SUBSTANTIAL FCPA SETTLEMENTS

In FCPA cases where the subjects of the inquiries have not challenged the government's allegations in court, the government continues to obtain substantial settlements.

Last December, the insurance broker Aon Corp. agreed to pay \$14.5 million to the SEC and \$1.76 million to DOJ with respect to allegations that it made improper payments to various foreign government officials in connection with its pursuit of insurance business in foreign countries. Aon settled the DOJ charges through a non-prosecution agreement which, according to DOJ, reflected in part Aon's "extraordinary cooperation" as well as its disclosure of improper payments.

On December 29, 2011, in what was reportedly the ninth largest penalty ever paid by corporate defendants to settle FCPA charges, Magyar Telekom Plc., the Hungarian telecom company, and its majority owner Deutsche Telekom AG agreed to pay collectively more than \$95 million to settle DOJ and SEC charges relating to illegal payments by Magyar subsidiaries in Macedonia and Montenegro. Magyar entered into a two-year deferred prosecution agreement and Deutsche Telekom entered into a two-year non-prosecution agreement, with DOJ. Both companies also entered into settlements with the SEC in which they agreed, among other things, to penalties and consented to a permanent injunction against future FCPA violations.

Notably, Magyar Telekom and Deutsche Telekom entered into these agreements shortly before the SEC's January 2012 policy change which requires that parties that admit to criminal conduct in parallel DOJ cases also admit liability in SEC settlement agreements when simultaneously resolving SEC charges. As a result, these companies were able to settle with the SEC without admitting or denying liability. Going forward, the SEC's new settlement policy is likely to have a particular impact on SEC settlements involving FCPA claims because the SEC and DOJ often resolve parallel FCPA cases simultaneously. What is less clear is whether, in these future FCPA settlements, the SEC will require defendants to admit all of the factual allegations in the SEC complaint or only those facts that are alleged and admitted in the parallel criminal case.

In another notable settlement, on January 17, 2012, DOJ entered into a \$54.6 million settlement and deferred prosecution agreement with Marubeni Corporation, the Japanese trading company, to resolve charges related to the company's involvement in a decade-long scheme to bribe Nigerian officials in order to secure contracts to build liquefied natural gas facilities on behalf of a joint venture.

And just last week, Smith & Nephew Inc., the Memphis-based subsidiary of a UK medical device manufacturer, agreed to pay more than \$22 million in settlement agreements with DOJ and the SEC in which it admitted to paying bribes to government-employed healthcare providers in Greece for more than a decade to induce them to purchase the company's products.

LOOKING AHEAD

While DOJ and the SEC continue to obtain substantial settlements in cases involving FCPA claims that are not challenged in court, the government's criminal FCPA enforcement efforts have resulted in a number of recent defeats in prominent cases involving defendants who have elected to litigate the charges in court. At the same time, the government faces growing pressure to support legislative reform of the FCPA, and DOJ has announced it will release official guidance on its FCPA enforcement practices. The impact of these developments, including whether DOJ's trial setbacks will embolden other defendants to challenge FCPA claims rather than enter into settlement agreements, remains to be seen.

* * *

This memorandum is for general informational purposes and should not be regarded as legal advice. Furthermore, the information contained in this memorandum does not represent, and should not be regarded as, the view of any particular client of Simpson Thacher & Bartlett LLP. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as additional memoranda, can be obtained from our website, www.simpsonthacher.com.

The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship. Simpson Thacher & Bartlett LLP assumes no liability in connection with the use of this publication.

UNITED STATES

New York

425 Lexington Avenue
New York, NY 10017-3954
+1-212-455-2000

Houston

2 Houston Center – Suite 1475
Houston, TX 77010
+1-713-821-5650

Los Angeles

1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto

2550 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.

1155 F Street, N.W.
Washington, D.C. 20004
+1-202-636-5500

EUROPE

London

CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing

3919 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong

ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Tokyo

Ark Mori Building
12-32, Akasaka 1-Chome
Minato-Ku, Tokyo 107-6037
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo

Av. Presidente Juscelino Kubitschek, 1455
12th Floor, Suite 121
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000