Top Ten FCPA Enforcement Actions in 2010-Part II

Yesterday we posted Part I of our Top 10 Foreign Corrupt Practices Act (FCPA) enforcement actions of 2010. Today we conclude the list. Although the holiday season is here, we would be remiss if we did not note that Houston Chronicle sports columnist Richard Justice pointed out in his column this morning that there are only 55 days until pitchers and catchers report to Spring Training. So for you baseball mavens out there, and we know who we are, good tidings abound. Now to Part II…

6. Panalpina Settlements-In what the FCPA Blog termed a history making day "for the most companies to simultaneously settle FCPA-related violations", the worldwide logistics firm Panalpina and five of its oil-and-gas services customers resolved charges with the DOJ and SEC, and another customer settled with the SEC for a total fines and penalties of $236.5 million. The customers of Panalpina which settled were Shell Nigeria Exploration and Production Company Ltd. ("SNEPCO"), a Nigerian wholly-owned subsidiary of Royal Dutch Shell; Transocean, Inc.; Pride International Inc. and Pride Forasol S.A.S.; GlobalSantaFe [now owned by Transocean], Tidewater, Inc. and Noble Corporation which did not receive a DPA but was granted a Non-Prosecution Agreement.

However more was announced yesterday than simply raw dollars. Each resolved enforcement action provided to the FCPA compliance practitioner significant information on the most current DOJ thinking on what constitutes a *best practice* FCPA program. Each of the Deferred Prosecution Agreements released yesterday, included an Attachment C, a document entitled "Corporate Compliance Program". Each Corporate Compliance Program was the same in all the DPAs announced yesterday. This same information was also attached to the Noble Non-Prosecution Agreement as "Attachment B". Hence, this information is a valuable tool by which companies can assess if they need to adopt new or to modify their existing internal controls, policies, and procedures in order to ensure that their FCPA compliance program maintains: (a) a system of internal accounting controls designed to ensure that a Company makes and keeps fair and accurate books, records, and accounts; and (b) a rigorous anti-corruption compliance code, standards, and procedures designed to detect and deter violations of the FCP A and other applicable anti-corruption laws. It is noted that in the Preamble to each Corporate Compliance Program noted that these suggestions are the "minimum" which should be a part of a Company's existing internal controls, policies, and procedures.

7. RAE Systems, Inc.-Lessons learned-companies are fully liable for their joint ventures actions and that even with actual knowledge of FCPA violations, conduct during the DOJ investigation can result in a Non-Prosecution Agreement. However this liability need not lead to criminal sanctions as RAE received a letter of Non-Prosecution from the DOJ. The DOJ's letter to the RAE CEO and its legal counsel declined to prosecute the company and its subsidiaries for its admitted "knowing" of violations of the internal controls and books and records provisions of the FCPA. The DOJ entered into this NPA

based upon four listed factors, which were detailed as follows: (1) timely and voluntary disclosure; (2) the company's thorough and "*real-time*" cooperation with the DOJ and SEC; (3) extensive remedial efforts undertaken by the company; and (4) RAE's commitment to periodic monitoring and submission of these monitoring reports to the DOJ.

Representatives from both the DOJ and SEC have been preaching the virtues and tangible benefits of self-disclosure and thorough cooperation with their respective agencies in any FCPA investigation or enforcement action. This RAE matter would appear to provide specific evidence of the benefits of such corporate conduct. The NPA reports that RAE had ***actual knowledge*** of FCPA violations yet no criminal charges were filed. Further, no ongoing external Corporate Monitor was required. Clearly RAE engaged in actions during the pendency of the investigation which persuaded the DOJ not to bring criminal charges.

Any company facing a FCPA enforcement action should study this matter quite closely and, to the extent possible, determine the steps that RAE engaged in or performed. The RAE enforcement action together with the Noble enforcement action which resulted also in a Non-Prosecution Agreement, were also reached with no external Corporate Monitor. No criminal penalties and no External Monitor are important examples of the tangible benefits for working closely with the DOJ in any FCPA enforcement matter.

8. Gerald and Patricia Green-Although this FCPA criminal enforcement action was tried to a jury in the summer of 2009, the two defendants, husband and wife Gerald and Patricia Green were not sentenced until the summer of 2010. The trial judge's sentence would appear to reflect the growing disparity between the sentences that the DOJ requests and those handed down by courts. The DOJ had originally sought a sentence of 25 years for Gerald Green (later reduced to requesting 10 years) and a ten year sentence for Patricia Green. US District Judge George Wu sentenced the couple to 6 months each.

While this sentence reduction may result in more personal freedom, Judge Wu granted the DOJ request for asset forfeiture, which means simply, as noted by the FCPA Blog "any assets derived from proceeds traceable to a violation of the FCPA, or a conspiracy to violate the FCPA, can be forfeited". Each of the Greens owe $1,049,465 under the forfeiture, plus their shares in their company, Artist Design Corp., and its pension plan. The amount owed is so great that the DOJ is attempting to seize the home residence of the Greens because the forfeiture penalty cannot be fully satisfied without the proceeds of the home sale. The DOJ has obtained such complete forfeiture of the couples' assets such that they have filed *in forma pauperis* appeals.

9. Haitian Telecom-While this case generated much discussion in the FCPA world, particularly regarding an idea derived from an article in the Wall Street Journal entitled "*Democrats and Haiti Telecom*" that enforcement of the FCPA in Haiti should be suspended in the aftermath of the devastating earthquake which hit the island earlier this

year. This was based on the fact that US companies simply could not do business in Haiti without violating the FCPA so they simply refuse to do so. To entice US companies to assist in the rebuilding efforts, the SOJ should suspend enforcement of the FCPA for some limited period of time. This idea was not seized upon by the DOJ.

While this debate was interesting, this case makes the Top 10 list because of what happened to the foreign officials who accepted the bribes. The FCPA only applies to bribe givers and not bribe recipients, the charges brought against the foreign officials who accepted the bribers were not FCPA charges, but rather a money laundering conspiracy charge. As reported by the FCPA Professor, these money laundering charges led to guilty plea by Robert Antoine (a former Director of International Relations of Haiti Teleco responsible for negotiating contracts with international telecommunications companies on behalf of Haiti Teleco). He was sentenced to four years in prison. In addition, Antoine was ordered to serve three years of supervised release following his prison term, ordered to pay $1,852,209 in restitution, and ordered to forfeit $1,580,771.

10. Innospec-Fine and Penalty waiver for inability to pay? In March 2010, Innospec agreed to pay $40.2 million in combined DOJ/SEC/SFO fines and penalties for violating the Foreign Corrupt Practices Act and other laws. However, as noted by the FCPA Professor, it could have been worse. The SEC release noted that Innospec, without admitting or denying the SEC's allegations, was ordered to pay $60,071,613 in disgorgement, but because of Innospec's "sworn Statement of Financial Condition" all but $11,200,000 of that disgorgement was waived. The release states that "[b]ased on its financial condition, Innospec offered to pay a reduced criminal fine of $14.1 million to the DOJ and a criminal fine of $12.7 million to the SFO. Innospec will pay $2.2 million to OFAC for unrelated conduct concerning allegations of violations of the Cuban Assets Control Regulations." As noted by the FCPA Professor, “Innospec got a pass on approximately $50 million.”

So Ho Ho Ho to all our readers and we hope you have a very Merry Christmas.

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