

The Department of Justice's Enhanced Focus on the Foreign Corrupt Practices Act

Recently, the Fraud Section, Criminal Division, Department of Justice culminated a busy week during which it announced two significant Foreign Corrupt Practices Act (FCPA) settlements. Statoil ASA, a Norwegian international oil company listed on the New York Stock Exchange, entered into a deferred prosecution agreement relating to bribe payments to secure "valuable oil and gas rights in Iran." In another case, a subsidiary of Schnitzer Steel Industries Inc. pleaded guilty to FCPA violations and the parent company entered into a separate deferred prosecution agreement.

These settlements reflect increasingly aggressive Justice Department enforcement of the FCPA. This trend will continue as Mark Mendelsohn, the Fraud Section Deputy Chief with responsibility for FCPA enforcement nation-wide, marshals additional resources dedicated solely to FCPA enforcement. In addition, the settlements vividly demonstrate the continued preference of the Fraud Section for costly and burdensome deferred prosecution agreements by which the Department of Justice imposes changes in internal controls and mandates future voluntary disclosure of wrongdoing, all under the supervision of a "monitor."

Statoil ASA

The Statoil matter was handled jointly by the Fraud Section and the United States Attorney in the Southern District of New York. Statoil paid both DOJ and the SEC \$11.5 million each to settle the criminal and civil investigations. The wrongdoing involved \$5.2 million in payments to a middleman "consultant" which were bribes to an Iranian official. The payments gained Statoil a subcontract to develop a major oil and gas field in Iran. Additional bribe payments were stopped by the company before they were paid. Statoil's books and records falsely reflected the consulting contract and Statoil also evaded its internal controls in committing the bribery. Statoil cooperated only after the matter became public and after the SEC expressed interest following press reports of the bribe payments.

The Statoil settlement is significant for several reasons. Jurisdiction was based on the fact that Statoil was a U.S. "issuer" and the bribe funds were wired through the U.S. U.S. authorities took enforcement action despite the fact that Statoil is a foreign company that did no business in the United States. A prior Norwegian settlement relating to the corrupt activity did not stop the United States from taking further action. Finally, the Statoil deferred prosecution agreement and SEC settlement include provisions regulating future activity by this foreign company. A monitor or "compliance consultant" will conduct an initial consultation and three follow-up reviews over three years. He will report to U.S. authorities on the underlying activity and the effectiveness of Statoil's FCPA compliance. He will also make recommendations concerning changes to Statoil's compliance programs.

Schnitzer Steel Industries Inc.

The Schnitzer Steel resolution involved guilty pleas to FCPA bribery and books and records violations, as well as wire fraud and conspiracy by the Korean subsidiary of the company. The parent company entered into a deferred prosecution agreement. Schnitzer Steel paid the DOJ \$7.5 million as a criminal fine and paid the SEC an additional \$7.7 million civil penalty. As part of the settlements, the company admitted making corrupt payments over a lengthy period of time to both employees of government-owned customers in China and private customers in China and South Korea to induce the customers to purchase scrap metal from Schnitzer. The payments involving government-owned customers amounted to \$204,000, and the payments involving private companies involved \$1.6 million. Profits

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derived from the corrupt payments totaled approximately \$60 million. The deferred prosecution agreement requires new compliance activity and the appointment of an independent “compliance consultant.” Of note, the Department of Justice press release is expansive in praising Schnitzer Steel for its internal investigation, voluntary disclosure, and cooperation, and commented that this is an example of a company getting a “tangible benefit.” That benefit likely involved which entity had to plead guilty.

Lessons Learned and the Future of FCPA Enforcement

The breadth of current FCPA enforcement and recent trends are illustrated by the types of cases which have been brought. For example, in the last few years, several indictments and settlements have involved high stakes oil-related bribes. These cases include: *U. S. v Giffen* (oil related fees involving Kazakhstan); *ABB Ltd.* (guilty pleas by two subsidiaries relating to oil projects in Nigeria); and *U.S. v Kozeny et. al.* (oil-related bribery involving Azerbaijan). Another group of cases have involved medical supplies to government owned hospitals. These include: *Diagnostic Products Corporation* (plea by a subsidiary to payment of illegal commissions to Chinese physicians); and *Micrus Corporation* (deferred prosecution agreement for medical device manufacturer involving payments to doctors of publicly owned facilities in Europe). In several of these cases the mechanism for making the illicit payment was through a “consultant” and the improper use of consultants has become a focal point of DOJ enforcement.

The use of Deferred Prosecution Agreements in Statoil and Schnitzer Steel as part of FCPA settlements cements the relatively recent DOJ trend to impose oversight over future management control. These agreements typically require future reporting of wrongdoing and enactment of remedial measures fully calculated to stop future wrongdoing. FCPA cases which imposed deferred prosecution agreements include: *Invision Technologies Inc.* (deferred prosecution agreement for airport screening manufacturer relating to activity in Thailand, China and Philippines); *Monsanto Co.* (deferred prosecution agreement relating to payment in Indonesia involving environmental regulations); and the *Micrus Corporation* matter referred to above.

The SEC and DOJ are working together to step up FCPA enforcement. Recent agreements have been quite expensive for the settling company. Companies who engage in FCPA violations can expect to pay large fines, and incur significant out of pocket costs associated with remedial activity and the substantial expense of funding of an independent consultants work for three years.

Recent enforcement actions have also expanded beyond the parameters of FCPA bribery and now include violations of FCPA books and records provisions, as well as failure to have adequate internal controls. In addition, enforcement has slowly tested the limits of U.S. jurisdiction. Increasingly, U.S. authorities are finding jurisdiction to prosecute foreign companies based on minimal U.S. contacts or because they are foreign issuers.

Finally, Mark Mendelsohn has settled in after two years as the Department of Justice’s key FCPA enforcer. He is determined to increase the profile of FCPA enforcement within the Fraud Section and the Department of Justice generally. As a result of the post Enron environment, the enactment of Sarbanes-Oxley, and the enactment of the OECD Convention on Combating Bribery resulting in stepped up foreign enforcement and cooperation, increasingly FCPA cases originate as voluntary disclosures. Mendelsohn has cemented the Section’s relationship with his counterparts in the SEC and priored additional resources to handle FCPA investigations out of the FBI. He is recruiting a new Assistant Chief to focus on FCPA and an announcement of the name of that assistant is expected in the near future. He has also hired attorneys who will be dedicated to FCPA enforcement and has been able to assign some of the Fraud Section’s most experience trial attorneys to significant cases.

In the current environment, it is increasingly evident that an effective compliance program, one that is consistently updated to acknowledge new trends and developments, is a cost effective way to manage a company’s exposure. Furthermore, once a problem is identified, companies must evaluate the need for aggressive internal investigations.

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