

Declinations During the FCPA Boom

James G. Tillen and Marc Alain Bohn, Miller & Chevalier Chartered

As enforcement of the Foreign Corrupt Practices Act (“FCPA” or “Act”) has risen to new heights in recent years, grabbing headlines and sparking an intense debate on how the Act should be prosecuted, there has been a less publicized trend that has paralleled this increase: decisions by the U.S. Department of Justice (DOJ) and Securities and Exchange Commission (SEC) to conclude formal and informal investigations into potential violations of the FCPA without bringing enforcement actions.

An Increase in Known Declinations

Such decisions to conclude investigations without enforcement — popularly known as “declinations” — are the most desirable outcome of an FCPA investigation for a company, but since U.S. enforcement authorities do not publicize these decisions, it is difficult to know how frequently they occur. Enforcement officials routinely suggest that declinations are commonplace, but provide few concrete details as to how often they occur or what circumstances would merit a decision to decline.¹

At a recent anti-corruption summit in Russia this March, Deputy Assistant Attorney General Greg Andres noted that although there were a record number of FCPA enforcement actions brought in 2010, the DOJ also declined to prosecute “a record number of cases.”² Andres attributed such decisions to a company’s ability to demonstrate “sound” internal procedures and compliance programs and, at least in part, to the self-disclosure of potential misconduct -- something Andres characterized as an “im-

portant factor” in arriving at a decision to decline FCPA enforcement.³

Lack of Transparency by Enforcement Authorities

While the DOJ and SEC are under increased pressure from FCPA practitioners and corporations subject to the Act to announce individual decisions to decline enforcement and explain the reasoning behind these decisions, they have, thus far, largely rejected calls to do so. When pressed on this issue at a recent congressional hearing, Andres explained that the government does not disclose this information “in large part because we don’t want to penalize a company or an individual that’s been investigated and not prosecuted,” suggesting “[t]here may be some prejudice from that.”⁴ As a result, declinations are currently only reported on if disclosed by the companies involved, generally through public filings or by press release.

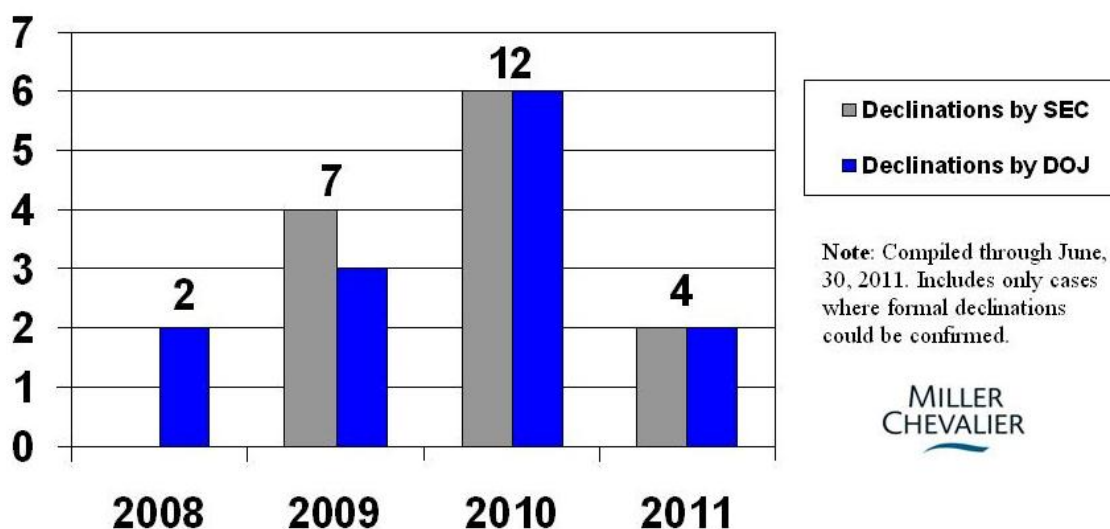
Known Declinations

Despite this lack of transparency from enforcement authorities, we have partially corroborated Andres’ claim that there were a record number of declinations in 2010 by conducting a systematic review of SEC filings and other public records. As reflected in the accompanying graph, nearly half of the declinations we identified -- six by the DOJ and six by the SEC -- appear to have occurred in 2010, which is almost double the number of declinations we were able to confirm for 2009.

© 2011 Bloomberg Finance L.P. All rights reserved. Originally published by Bloomberg Finance L.P. in the Vol. 2, No. 8 edition of the Bloomberg Law Reports—Corporate Counsel. Reprinted with permission. Bloomberg Law Reports® is a registered trademark and service mark of Bloomberg Finance L.P.

This document and any discussions set forth herein are for informational purposes only, and should not be construed as legal advice, which has to be addressed to particular facts and circumstances involved in any given situation. Review or use of the document and any discussions does not create an attorney-client relationship with the author or publisher. To the extent that this document may contain suggested provisions, they will require modification to suit a particular transaction, jurisdiction or situation. Please consult with an attorney with the appropriate level of experience if you have any questions. Any tax information contained in the document or discussions is not intended to be used, and cannot be used, for purposes of avoiding penalties imposed under the United States Internal Revenue Code. Any opinions expressed are those of the author. Bloomberg Finance L.P. and its affiliated entities do not take responsibility for the content in this document or discussions and do not make any representation or warranty as to their completeness or accuracy.

Known Declinations in FCPA Investigations from 2008-2011



Our review, while certainly incomplete, extended back to 2008 and identified at least twenty-five formal declinations by the DOJ and/or SEC involving twenty companies, nearly all of them publicly-listed. We also identified several additional cases that might represent declinations, but for which we could find no explicit confirmation of a decision to decline prosecution.⁵ The dearth of private companies among those with known declinations is due to the fact that these companies are not bound by the same disclosure requirements as companies listed on public exchanges, both in terms of ongoing investigations and resolutions. As a result, private companies may often conclude that the hazards of revealing a declination outweigh any potential ben-

efits, particularly if the underlying investigation was not publicly disclosed.

Even where we have been able to confirm a declination, there are usually significant unanswered questions as companies, in most instances, do not state the basis for the declinations they have received and often provide only limited information about the conduct that was investigated. Thus, it is often unclear why a government investigation has closed without enforcement. It could be that no violations were found to have occurred, that no basis for jurisdiction existed, that enforcement authorities elected to do nothing in deference to a foreign investigation, or that the declination itself represents

© 2011 Bloomberg Finance L.P. All rights reserved. Originally published by Bloomberg Finance L.P. in the Vol. 2, No. 8 edition of the Bloomberg Law Reports—Corporate Counsel. Reprinted with permission. Bloomberg Law Reports® is a registered trademark and service mark of Bloomberg Finance L.P.

This document and any discussions set forth herein are for informational purposes only, and should not be construed as legal advice, which has to be addressed to particular facts and circumstances involved in any given situation. Review or use of the document and any discussions does not create an attorney-client relationship with the author or publisher. To the extent that this document may contain suggested provisions, they will require modification to suit a particular transaction, jurisdiction or situation. Please consult with an attorney with the appropriate level of experience if you have any questions. Any tax information contained in the document or discussions is not intended to be used, and cannot be used, for purposes of avoiding penalties imposed under the United States Internal Revenue Code. Any opinions expressed are those of the author. Bloomberg Finance L.P. and its affiliated entities do not take responsibility for the content in this document or discussions and do not make any representation or warranty as to their completeness or accuracy.

a benefit in recognition of a company's voluntary self-disclosure, remediation and/or cooperation.

Analysis of Specific Declinations for Trends

Despite the limited information available, one can sometimes still infer the reasoning behind a given declination. For example, in at least six instances -- Bristow Group, Inc., Con-Way Inc., Avery Dennison Corp., General Electric Co., Ball Corp., and Rockwell Automation, Inc. -- the DOJ formally declined to prosecute companies⁶ while the SEC filed civil FCPA charges for alleged accounting violations and/or sought administrative orders enjoining the companies from future violations of the Act.⁷ Under these circumstances, and considering the fact that the SEC brought no civil anti-bribery claims, it is likely that the DOJ determined there was insufficient evidence or lack of jurisdiction to pursue criminal anti-bribery charges and that the civil violations were insufficient to support criminal accounting charges.

Where the DOJ and SEC have both declined to pursue enforcement -- such as the recent investigations involving Global Industries, Ltd., Digi International Inc., Golden Minerals Co. (formerly Apex Silver Mines Ltd.), and CB Richard Ellis Group Inc.⁸ -- it may be more difficult to decipher a motive. If jurisdiction existed over any potential misconduct in these matters, however, the declinations themselves may represent a benefit in recognition of the voluntary self-disclosure, remediation and noteworthy cooperation provided by each of these companies.

Declinations and Voluntary Self-Disclosures

Although divining the specific rationale of the DOJ and SEC in individual cases like these can be challenging, the vast majority of known declinations are nevertheless in response to conduct that companies have voluntarily self-disclosed. Nineteen of the twenty-five declinations we identified (or 76 percent) involved self-disclosures. It is clear that, as a general matter based on known declinations, a company that self-discloses potential FCPA viola-

tions is significantly more likely to secure a declination than a company that does not.

The benefits of voluntary self-disclosures are frequently hotly debated in the FCPA community, and factoring in the recent rise in declinations further affects the calculus involved in determining such benefits. A significant portion of FCPA enforcement activity in recent years has resulted from conduct that companies chose to voluntarily self-disclose -- constituting nearly 60 percent of combined corporate resolutions since 2007 by our calculations⁹ -- which, when considered alongside the often large monetary penalties imposed as part of some of these enforcement actions, has led many commentators to call into question the benefits of self-disclosures. Establishing the exact benefits of making a voluntary self-disclosure, however, is a complicated undertaking since: (1) enforcement authorities do not quantify the benefits of self-disclosure; (2) settlement documents in FCPA dispositions contain varying degrees of detail regarding illicit payments made and the corresponding benefits obtained, frustrating efforts to compare cases; (3) settlement agreements typically focus on the total benefit derived from multiple factors, including various types of cooperation and remediation, in addition to the act of self-disclosing; and (4) as noted earlier, it is not clear how often the DOJ declines to pursue enforcement in the face of a self-disclosure.

An analysis we conducted of combined enforcement actions and known declinations since 2007, however, found that the average combined monetary assessment (including penalties and disgorgement) imposed in cases where violations were voluntarily self-disclosed dropped by nearly 20 percent when declinations were included. In addition, in order to compare the penalties and disgorgement assessed in voluntarily self-disclosed matters with non self-disclosed matters, we calculated the average amount companies were penalized per dollar of identifiable profit they received.¹⁰ We found that, when compared against the average profit companies realized from their illicit conduct, the average combined monetary assessment imposed on com-

panies which voluntarily self-disclosed was nearly 25 percent lower than that imposed on companies that did not. In summary, when factoring in declinations, self-disclosers paid approximately \$1.3 dollars in fines and disgorgement for every \$1 dollar they earned in illicit profit, while companies that did not self-disclose paid approximately \$1.7 dollars.

Importance of Considering Declinations

Although decisions to close FCPA investigations by declining to take enforcement actions might reflect an insufficiency of evidence, the absence of jurisdiction, or a lack of actionable misconduct, they can also represent the clearest evidence of benefit from a voluntary self-disclosure or from extraordinary cooperation. Therefore, any determination of whether to voluntarily self-disclose a potential violation or cooperate fully with enforcement authorities in an investigation is incomplete without including the recent spike in declinations in the analysis of what, strategically, is in the company's best interest.

The recently published Dodd-Frank whistleblower regulations, which are scheduled to go into effect August 12, 2011, may end up significantly altering this voluntary self-disclosure analysis.¹¹ The regulations will naturally lead to an uptick in self-disclosures as public companies race whistleblowers to bring potential issues to the SEC's attention. Whether the SEC (and DOJ) will view company self-disclosures in this context as "voluntary" remains to be seen. One helpful byproduct of the new regulations, however, may be more available data on future declinations announced in the public filings of issuers reporting FCPA-related matters to the SEC.

James G. Tillen is a member at Miller & Chevalier Chartered, where he chairs the firm's FCPA and Anti-Corruption practice group. Marc Alain Bohn is an associate with the international practice group at the firm.

1 For instance, Lanny Breuer (Assistant Attorney General, Criminal Division) generically told attendees at a prominent FCPA conference in 2009 that "despite rumors to the contrary, we do also decline prosecution in appropriate cases." Address to the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009). (

2 Robert Wieck, "A Focus on Russia," FCPA Professor Blog, (April 26, 2011) (last accessed July 10, 2011).

3 *Id.*

4 Statement of Greg Andres, "Foreign Corrupt Practices Act," before the U.S. House, Crime, Terrorism and Homeland Security Subcommittee of the House Judiciary Committee (June 14, 2011). Andres also signaled, however, that the DOJ may be ready to cede at least some ground on this issue. When pressed for more information on the number of cases the DOJ has declined to prosecute and what factors went into those decisions, Andres said "to the extent that we can gather that information [for you], we'll certainly try to." *Id.*

5 See, e.g., the long-running investigations into potential FCPA violations by ERHC Energy Inc. In a recent SEC filing, ERHC noted that all documents taken by federal investigators in connection with the case had been returned and stated that the company had no reason to believe the investigations were still active, although it has yet to receive any "formal communication" concluding the matters. ERHC Energy, Dec. 31, 2010 Form 10-Q (filed Feb. 8, 2011).

6 See Bristow Group, Inc., Dec. 31, 2010 Form 10-Q (filed Feb. 2, 2011); Con-Way Inc., Sep. 30, 2008 Form 10-Q (filed Nov. 7, 2008); Avery Dennison Corp., 2009 Form 10-K (filed Feb. 26, 2010); "GE Announces Settlement of Oil-for-Food Matter," General Electric Co. Press Release (Jul. 27, 2010), available at <http://www.genewscenter.com/Press-Releases/GE-Announces-Settlement-of-Oil-for-Food-Matter-29b8.aspx> (last accessed July 11, 2011); Ball Corp., 2009 Form 10-K (filed Feb. 25, 2010); and Rockwell Automation, Inc., Dec. 31, 2010 Form 10-Q (filed Feb. 3, 2011).

7 See *In re Bristow Group Inc.*, SEC Admin. Proc. No. 3-12833 (2007); *SEC v. Con-way, Inc.*, No. 08-1478 (D.D.C. 2008); *SEC v. Avery Dennison Corp.*, No. 2:09-cv-5493 (C.D. Cal. 2009); *SEC v. General Electric Co.*, No. 1:10-cv-01258-RWR (D.D.C. 2010); *In re Ball Corp.*, SEC Admin. Proc. No. 3-14305 (2011); and *In re Rockwell Automation, Inc.*, SEC Admin. Proc. No. 3-14364 (May 3, 2011).

8 See Global Industries Ltd., 2009 Form 10-K (filed Feb. 26, 2010); Digi International Inc., September 30, 2010 Form 10-K (filed Nov. 29, 2010); Golden Minerals

Co., 2010 Form 10-K (filed Feb. 17, 2011); and CB Richard Ellis Group, Inc., 2010 Form 10-K (filed Mar. 1, 2011).

9 The DOJ frequently claims that the number of enforcement actions resulting from voluntary self-disclosures is much lower than this. In 2009, Lanny Breuer said “I want to be clear: the majority of our cases do not come from voluntary disclosures.” See EN 1. More recently, William Stuckwisch, another official at the DOJ, stated that 50 percent of the DOJ’s corporate resolutions since 2010 were the product of self-disclosures. Joe Palazzolo, “Company Self-Disclosures Accounted for Half of DOJ FCPA Cases Since 2010,” Wall Street Journal Blog, (June 23, 2011) (last accessed on July 11, 2011).

10 In calculating the benefits of voluntary self-disclosures, we believe profit realized is the most appropriate metric to use since the amount a company benefited from an illicit act has more bearing upon the monetary assessment imposed than other factors. In cases where no overall profit figure was stated, we used the amount disgorged as a stand-in for profit realized. We excluded the enforcement actions against Siemens AG, since the disgorgement imposed did not have any discernable relation to the actual profit realized by the company, and BAE Systems plc, which technically was not an FCPA matter and also did not clearly state the actual profit realized from the company’s illicit acts.

11 Securities Whistleblower Incentives and Protections, 17 C.F.R. §§ 240.21F–1–17 (effective date August 12, 2011). These regulations are being implemented pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203 (July 21, 2010).